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IN THE

Supreme Court of The United States

OCTOBER TERM, 1967

No. 1227

ROBERT L. STRAUSS,

Petitioner,

vs.

T. RALPH GRIMES, Sheriff of Fulton County, Georgia,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

ARTHUR B. CUNNINGHAM
PHILIP T. WEINSTEIN
812 Ainsley Building
Miami, Florida 33132

HAROLD KARP
1317 William Oliver Bldg.
Atlanta, Georgia 30303

Attorneys for Petitioner

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T. RALPH GRIMES, Sheriff of Fulton County, Georgia,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in the above-entitled case on November 22, 1967, rehearing of which was denied December 7, 1967.

CITATIONS OF OPINIONS BELOW

The decision of the Supreme Court of Georgia is reported at 223 Ga. 834, 158 S.E.2d 404, and is set forth at pages 154-159 of the certified record herein, and as well in appendix, infra, pp. 1-4. Denial of a petition for rehearing appears in the record at R. 165.

JURISDICTION

The judgment of the Supreme Court of Georgia affirming the lower court's denial of a petition for writ of habeas corpus in the Superior Court of Fulton County, Georgia, was entered November 22, 1967, and denial of rehearing was entered December 7, 1967. On March 6, 1968, Mr. Justice Black entered an order extending the time for filing Petition for Certiorari, to March 16, 1968.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted, at all stages of this habeas corpus proceeding, a deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1) Whether the petitioner established a prima facie case of racial exclusion from Georgia juries, in violation of the Fourteenth Amendment when,

a) The process of jury selection from racially designated sources was substantially the same, or considerably worse, than that condemned in *Whitus v. Georgia*, 385 U.S. 545; and,

b) The resulting disproportion of eligible Negroes to Negroes on the jury, is greater than that shown in *Whitus* and other cases following.

2) Whether petitioner, as a white man, may complain of purposeful exclusion of Negroes from Georgia juries, either

a) Because such exclusion presumes harm; or,

b) Because the State purposefully and willfully injected the Negro racial issue into the proceedings below.

3) Where juries have been selected by methods condemned in principle, by this Court, for at least twelve years prior to the return of the indictment herein,

a) Is any issue of retroactivity present; and,

b) If such issue is present, is the rule of *Whitus* to be given retrospective application?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) This case involves the Fourteenth Amendment to the Constitution of the United States.

2) This case also involves §§59-106, 59-201, 92-6302 and 92-6307 of the Georgia Code (see App. 5-6, et seq.).

STATEMENT

Petitioner was originally indicted in 1964 by the Fulton County Grand Jury on a five-count indictment charging violation of the Georgia Securities Act, Code §97-112(b). He was tried in October, 1966, found guilty, and sentenced to fifteen years imprisonment, and has been held in jail, without bond, since the conclusion of the trial.

He took a timely appeal of his conviction to the Court of Appeals of Georgia, which dismissed the appeal, sua sponte, *Strauss v. State*, 116 Ga.App. 154, 156 S.E.2d 543, and the Supreme Court of Georgia denied certiorari in an unreported order.

After dismissal of petitioner's appeal, he filed in the Superior Court of Fulton County, Georgia, a petition for

habeas corpus (R. 12, et seq.), drawn under the provisions of the newly enacted Georgia Habeas Corpus Act of 1967, Ga.L. 1967, 835, Code §50-101, et seq.[1].

In this habeas corpus, petitioner, for the first time, asserted that the grand jury which returned the indictment, and the Petit Jury which convicted him, had been made up and constituted on an illegal and unconstitutional basis—the very basis which had been condemned in *Whitus*, and in subsequent decisions. The case came on for hearing before the Superior Court, at which time testimony was taken and exhibits introduced.

Proof Adduced

At the hearing, the petitioner proved the following facts: He was indicted by the November-December 1964 Grand Jury of Fulton County, Georgia (R. 12, 15, 35, 41). The grand jury that returned the indictment was taken from a venire (R. 98), Exhibit 5 (R. 141) which was, in turn, prepared from the "1962-1963 Jury List" (Exhibit 4 (R. 140, 97). At the time Exhibit 4 was made up, it is unquestioned that Georgia was governed by the statutory sections which are set forth as an Appendix to this petition, (App. 5-6)[2].

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[1]This new law granted Superior Courts in Georgia, habeas corpus powers intended to be co-existent with those exercised by Federal courts.

[2]This Court recently summarized the then applicable procedure for selecting grand and petit jurors as follows:

"Georgia law requires that the six commissioners appointed by the Superior Court 'select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets'. Ga.Code Ann. §59-106. They are also directed to select from this group a sufficient number, not exceeding two-fifths of the whole number, of

The venire of seventy-five names from which the grand jury was taken contained the names of only two Negroes (R. 107).

Petitioner also introduced statistical data from official United States census data from 1960 (R. 104), and computerized data from the F[illegible]n County Tax Digest for 1962 (R. 128, 86; Exhibit 3, 129-138, 87). The evidence adduced at the hearing is summarized by the following table:

STATISTICAL TABLE—FULTON COUNTY GRAND JURORS

1960 Census Figures — Population Age 21 and over — Fulton County

Total Males	155,900 =	100%
White Males	108,019 =	69.3%
Colored Males	47,881 =	30.7%
Total Males & Females	339,058 =	100%
All Whites	231,045 =	68.14%
All Negro	108,013 =	31.86%

1962 Tax Digest Recap (Exhibit 3)

White Taxpayers	161,192 =	85.01%
Colored Taxpayers	27,537 =	14.99%

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the most experienced, intelligent, and upright citizens to serve as grand jurors, writing their names on other tickets. The entire group, excepting those selected as grand jurors, constitutes the body of traverse jurors. The tickets on which the names of the traverse jurors are placed are deposited in jury boxes and entered on the minutes of the Superior Court. Ga. Code Ann. §§59-108, 59-109. The veniremen are drawn from the jury boxes each term of court and it is from them that the juries are selected." *Whitus v. Georgia*, 385 U.S. 545, 548 (1967).

November - December 1964 Fulton County Grand Jury Venire

White	73
Colored	2
% Male Population over 21 (Colored)	30.7%
% of 1962 Tax Digest (Colored)	14.99%
% of 1964 Grand Jury Venire (Colored)	2.7%

Witness Howard M. Hargis, Sr., testified that he had been one of six jury commissioners picked in 1962 to revise the jury list and that the 1962 list was selected from 170,000 tax returns from which 37,477 petit jurors were picked and from that list, 3,913 grand jurors were placed in the "Grand Jury Box" (R. 63-64). The list was prepared from copies of tax returns.

These copies were, admittedly, of *different colors* for white and Negro taxpayers, and the commissioner well knew which was which.

The tax returns also showed, on their face, the race of the taxpayer.

This commissioner testified that he did not use the Tax Digest itself. On cross-examination, Hargis denied that he had systematically excluded any Negroes from jury service (R. 69), but he also indicated rather strongly that he would consider a Negro only if he wrote in "a good hand" and returned property[3]. He had no other informa-

[3] "Q Did you try to get any particular portion of Negro on the jury?

A We did, and the jury list will show we did.

Q In what basis did you approach it?

A From the tax return. If they wrote a fairly good hand, if they returned any property, why we would entertain their name and would put them on there." (R. 70)

tion, except the tax return or his personal acquaintance (R. 71).

Witness Schukraft, another jury commissioner, confirmed the use of the different colored tax returns in making up the 1962 jury lists. He did not recall which color of return represented which race (living in and out of the city), but he testified:

> "I don't remember exactly what it was but we knew what was colored and we knew what was white." (R. 76).

Schukraft also confirmed that no reference was made to the Tax Digest itself (R. 78). This witness denied that he excluded any jurors on account of race and stated that he made some effort to get white and Negro people (R. 78-79), jews and women on the list. He knew of no figure in existence as to the percentage or proportion of Negroes on either the grand jury or the petit jury. The witness further testified that to his knowledge there had never been a Negro jury commissioner in Fulton County (R. 80).

Witness Barrett was an employee of the Fulton County Tax Department. He testified that during the applicable period there were four different colors of tax returns; blue and white for white persons living outside and inside of the city of Atlanta, respectively; pink and green for colored persons living inside and outside the city of Atlanta, respectively (R. 85).

Each of these returns showed the race and sex of the taxpayer (R. 85).

The witness also identified a page of the Tax Digest (R. 86, Exhibit 2, R. 128), and the Tax Digest Recap (R. 87, App. Exhibit 3, R. 129), whereby the race of each taxpayer could readily be identified by a symbol prepared by a computerized accounting system.

Witness Stephens (R. 90, et seq.) was a director of data processing for Fulton County. He gave further testimony as to Exhibit 3, the Tax Digest Recap (R. 129). In this recap there was a breakdown of the number of tax returns received by white, Negro inside city, outside city, and also the number of tax bills prepared on the same basis. He also testified as to the existence of a "defaulters digest" (R. 93). However, this latter compilation did not figure in the preparation of the jury list, although the racial tabulation therein was readily identifiable (R. 94, 96).

Up to January 1, 1967, the State of Georgia required this witness to segregate the tax digest by race (R. 94).

Lillian Witcher was the jury clerk of Fulton County. She identified petitioner's Exhibit 4 (R. 97, 139, et seq.) as the Revised 1962 Jury List from which the grand and petit jury venire here in issue was selected. Grand jurors were identified by asterisks (R. 98). She further testified that the 75-name venire for the November-December 1964 was drawn by Judge Moore from slips containing the asterisk names in petitioner's Exhibit 4 (R. 98). These were the names that were placed in the box (R. 101).

There was no question that the grand jury which returned the indictment herein consisted of 23 of the venire of 75 (R. 98).

The witness knew nothing as to percentages of Negroes on any of the lists, although she said she had seen Negroes on the juries (R. 103).

Witness Hobbs, a lawyer, introduced population statistics (R. 104) and testified as to arithmetical computations made from the exhibits in evidence and testimony. The gist of his testimony is summarized in the "Statistical Table".

There was no dispute as to this witness testimony that the venire of 75 grand jurors contained but two Negroes, and that the grand jury itself contained but one (R. 107).

Testifying in his own behalf, petitioner identified himself as a white male citizen in custody. He denied having, in any manner, waived any rights in connection with the challenge to the grand and petit juries raised in these proceedings (R. 111).

On cross-examination, petitioner identified himself as a contributor to, but not a member of, the NAACP. He also stated that the race issue had been raised at the time of the trial—in fact, by the very opening statement to the jury by the Assistant County Solicitor, Sparks (R. 112-114)[4].

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[4]Relevant portions of the text of said opening statement taken from the original trial record, with appropriate emphasis, are included as an Appendix to this brief. This record was before the Georgia Supreme Court in connection with its denial of certiorari from the dismissal of the original appeal.

How the Federal Questions Were Raised and Decided Below

The Georgia Habeas Corpus Act of 1967 (Code §50-101 et seq.) provides for jurisdiction in the Superior Courts of the State of Georgia for any person imprisoned under a state sentence

> " * * * who asserts that in the proceeding which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States * * * ."

The petition for writ of certiorari brought under this act in the Superior Court of Fulton County, Georgia, alleged that the petitioner's detention was unconstitutional because the method of selection of the grand jury which indicted him, and the petit jury which convicted him, was in violation of the due process of law and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States (R. 13). This was the only question raised in said petition.

After entertaining the petition on its merits, and receiving evidence, the Superior Court entered an order dismissing the same and remanding the petitioner to custody on the grounds, inter alia, that Negro citizens were not systematically excluded from juries in Georgia (R. 40-41); that as a white man the petitioner could not show any harm to him by any discrimination against Negroes in juries (R. 41); that petitioner had no right to have any percentage of Negroes on juries (R. 42); and that the application of this Court's *Whitus* decision would have such serious impact upon the administration of justice in

Georgia that it should not be applied retroactively, regardless of the showing made (R. 43-44).

On direct appeal, the Supreme Court of Georgia specifically declined to pass upon the merits of the constitutional questions (R. 156)[5], and held that this Court's decision in *Whitus* would not be applied "retroactively" to the facts shown in the case sub judice.

On petition for rehearing (R. 161), the petitioner urged that such a ruling was necessarily contrary to this Court's actions in *Whitus v. Balkcom*, 370 U.S. 728, 82 S.Ct. 1675, 8 L. Ed.2d 803 (1962). Rehearing was denied without opinion (R. 165).

REASONS FOR GRANTING THE WRIT

I. The Judgment Below is in Direct Conflict With This Court's Decision in Whitus v. Georgia, 385 U.S. 545, and Cases Following.

A. A prima facie case of discrimination was made.

It cannot be seriously questioned that the petitioner's claims of discrimination in the selection of the Fulton County Grand Jury in 1964 are identical to those decided by this Court in *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599; *Jones v. Georgia*, U.S. , 88 S.Ct. 4, L.Ed.2d (1967); *Cobb v. Georgia*, U.S. , 88 S.Ct. 115, L. Ed.2d (1967); *Sims v. Georgia*,

[5] "Under our view of the case, we do not reach the claim of unconstitutional selection of the grand jury." 223 Ga. 834, 835, S.E.2d .

U.S. , 88 S.Ct. 523, L.Ed.2d (1967); and *Anderson, et al v. Georgia*, 329 Misc., U.S. , (Decided March 5, 1968). See also, *Bostick v. South Carolina*, 386 U.S. 361, 87 S.Ct. 1088, L.Ed.2d (1967), reversing 145 S.E.2d 439.

Indeed, the process of juror discrimination demonstrated in the case at bar is more flagrant than in any of the decisions above cited, and more closely resembles the "yellow card" practice condemned as early as 1952, in *Avery v. Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1952).

It will be recalled that in *Whitus v. Georgia*, supra, the Court condemned a process of jury selection similar in design and operation to that proved in the case at bar. However, in *Whitus*, and also *Cobb*, supra, the jury lists were made up from Tax Digests, wherein the race of the taxpayer was indicated, solely, by a letter ("W" for white, "C" for colored). In the case at bar, the evidence is undisputed that the jury selection was made *directly* from the tax returns, which were of different color for different races (R. 68).

Therefore, whatever opportunities and temptations for discrimination were present in *Whitus*, *Cobb*, *Jones* and *Sims*, were made physically easier in the case at bar. A jury commissioner need not even study small print to discover the race of a prospective juror and, indeed, unless he were suffering from daltonism, he would instantly be able to determine the race by just glancing at the color of the paper. That the different colors were intermixed, seems to petitioner's counsel to be a distinction without a difference, since the commissioners would have the identical oppor-

tunity for discrimination—except that they could accomplish it with more dispatch. It is our view that the contrasting colors would be equally, or more, obvious than separate piles. Essentially this is the same practice condemned in the cases decided both this term and last, and, indeed, it reaches back, in principle, to *Avery*.

The opportunities for discrimination are clear. Not only are the commissioners instantly aware of the race of any prospective juror, but, at least one of the commissioners indicated that he applied different standards to prospective Negro jurors than to prospective white jurors: Jury Commissioner Hargis testified that he would consider a Negro juror if—and presumably only if—he "wrote a fairly good hand and returned any property" (R. 70). There is no evidence whatsoever that similar standards of calligraphy or affluence were applied to any white jurors.

The only other standard testified to by any commissioner was personal knowledge (R. 71), and there is no evidence that the particular witness knew any Negroes.

No Negro had ever served as jury commissioner (R. 80).

A comparison of the opinion in *Whitus*, supra, with the table contained on page 5 of this petition, will reveal that the disparity between colored males, colored taxpayers, and colored grand jury veniremen is much greater in the case at bar than in *Whitus*, where it was held that such disparity made a prima facie case of purposeful discrimination. In *Whitus* the disparity was between 27.1% for the tax digest and 9.3% on the grand jury venire; whereas,

in the case at bar, the comparable figures are, respectively, 14.99% and 2.7%.

This Court, using the statistical techniques outlined by Finkelstein[6], observed that the chance probability that 9.3% would appear on a venire where 27.1% of the tax digest were Negroes would be a mathematical probability of .000006.

We represent to this Court that applying the same formulae to the disparity in the case at bar would give a mathematical probability which would consist of a decimal point followed by seven zeroes.

The magnitude of the prima facie showing of purposeful discrimination made by the petitioner can also be shown in the following way: We herewith reproduce a portion of the opinion of the Court in *Jones v. Georgia*, U.S. , 88 S.Ct. 4, L.Ed.2d (1967), beside which we have included, in a ruled box, the comparable figures for the case at bar:

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[6]Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv.L.Rev. 338 (1966).

	"WHITUS"	"PETITIONER'S CASE [Jones]"	STRAUSS'S CASE
"Over 21 Population	42% Negro men	30% Negro	30.7% Negro
"Jury Commissioners	White (apparently)	White	White
"Source of Juror Names	Tax Digest separated and identified as to race	3 Tax Digests, two of which separated and identified as to race	Tax Returns —Race identified by color of return and by use of symbol "W" for white and "C" for colored
"Taxpayers "Negro Jurors	27.1% Negro 9.3% grand jury venire 7.8% petit jury venire	20% Negro 5% of jury list and box (1 Negro was on the grand jury which indicted petitioner	14.99% Negro 2.7% (One Negro on grand jury list which indicted Strauss
"Rebuttal Evidence by State	None	None"	None

The state has no more explained this overwhelmingly unlikely disparity than it did in *Whitus*, *Cobb*, or *Jones;* and this failure of explanation in each of those cases has been the basis for reversal.

B. The petitioner, a white person, is entitled to constitutionally selected grand or petit juries, particularly when Negro racial issue was injected into trial by state.

The opinion of the Georgia Supreme Court was specific in that it did not

" * * * reach the claim of unconstitutional selection of the grand jury." (App. 3)

However, the opinion of the trial court, whose judgment the Supreme Court of Georgia affirmed, bottoms its actions, in a large measure, upon a finding that the petitioner, as a white man, was not harmed and could not complain of the systematic exclusion of Negroes from juries (R. 39, 41, 43).

While this concept would, at first glance, appear to have formed no part of the *ratio decidende* of the Georgia Supreme Court, that court's two references to the petitioner as a "white man" impels petitioner, out of caution, to meet this point.

We submit, therefore, that any "semble" decision by the Georgia Supreme Court that a defendant cannot complain of systematic exclusion of a class from juries, unless he is a member of the class excluded, is directly contrary to this Court's holding in *Ballard v. United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181, and cases from other jurisdictions following the same.

In *Ballard*, supra, this Court decided that a male defendant in a criminal case was entitled to challenge the systematic exclusion of women from California federal juries (where women were eligible and required to serve) [7].

[7] "But reversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84, or

Other courts, including a court in Georgia, have—we think, correctly—interpreted this case as standing for the general proposition that

> "A departure from the statutory scheme which 'deprives the jury system of the broad basis it was designed by Congress to have in our democratic society' may be asserted by any litigant, even though he is not a member of the excluded class." *Rabinowitz v. United States*, 366 F.2d 54 (CA 5, 1966).

See, also, *Allen v. State*, 110 Ga.App. 56, 137 S.E.2d 711 (1954), *Cobb v. Balkcom*, 339 F.2d 95, 98 (1964), *United States v. Hunt*, 265 F.Supp. 178 (WD Texas, 1967).

A decision that the petitioner could not complain of jury discrimination solely because of his race would not only be in conflict with *Ballard*, supra, but would place the courts in a position of approving a "reverse racism" in which Negro defendants would have rights not available to white defendants. Surely the Equal Protection clause of the Fourteenth Amendment would forbid this type of discrimination, as much as it would the more familiar kind.

In the case at bar, however, there is considerably more than the presumptive harm resulting to the petitioner from

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an economic or social class, Thiel v. Southern Pacific Co., *supra*, deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme. As well stated in United States v. Roemig, D.C., 52 F.Supp. 857, 862, 'Such action is operative to destroy the basic democracy and classlessness of your personnel.' It 'does not accord to the defendant the type of jury to which the law entitles him. It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him.' * * * ." 67 S.Ct. 261, 265.

jury discrimination. He showed *actual* harm. Here, it cannot be disputed that the State tried—with apparent success—to inject the racial issue into the trial. In his very opening statement, the Assistant County Solicitor of Fulton County, Georgia, made a great point of bringing out that the petitioner (in the operation of his money order companies) was dealing with an all *Negro* bank in Virginia, and a *Negro* bank in Atlanta (R. 113)[8]. These remarks were obviously an appeal to the coarsest kind of prejudice against people who deal, or do business, with Negroes. If such remarks were passed in open court with all present, the mind reels to suppose what went on in the ex parte privacy of the grand jury.

II. Decision Below Misconstrues Law of Retroactivity and is Necessarily in Conflict with This Court's Ruling in *Whitus v. Balkcom*, 370 U.S. 728.

The Supreme Court of Georgia did not reach the merits of the petitioner's claims of jury discrimination because it decided that *Whitus v. Georgia*, supra, would not be given what that court characterizes as "retroactive application" (App. 3). In so holding, we submit that the Georgia court decided this important federal question in a way probably not in accordance with the applicable decisions of this Court and, in particular, the earlier de-

[8]The exact words of the prosecutor were: "I expect to show you further that these money orders were clearing through the Crown Savings Bank in Newport News, Virginia, and I expect to show you that it is an all or was an all Negro bank. * * * I expect to show you that the money order companies had established an account in a local bank here, the Citizens Trust Company, which is also a Negro bank here in Atlanta, * * * ." (App. 8, 9).

cisions involving the same defendant — *Whitus v. Balkcom*, 370 U.S. 728, 82 S.Ct. 1675, 8 L.Ed.2d 803 (1962).

The Supreme Court of Georgia cited four recent decisions in which the court declined to apply landmark decisions relating to criminal procedural matters to cases decided prior to the date of such decisions[9]. However, each of those decisions involved *changes* in existing law enforcement procedures, and at least two of these decisions involved the specific overruling of prior decisions of this court[10].

We believe, however, that the concept of retroactivity has no place in the case at bar, since *Whitus v. Georgia*, supra, did not change existing law or overrule any precedent, but was only a continued application of decades of authority. Indeed, as this Court so carefully pointed out in *Whitus v. Georgia*, supra, discrimination against Negroes, or any other class of persons, in the selection of state juries, has been held violative of the Fourteenth Amendment since 1880, in *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664, and the principle has been several times reiterated, *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); *Pierre v. Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed 757 (1939). Further, this Court found that the circumstances struck down in *Whitus* were "akin" to those condemned in *Avery v. Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed 1244 (1953). Subsequently, in *Williams v. Georgia* 349 U.S. 375, 75 S.Ct. 814, 99 L.Ed

[9] *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 15 L.Ed. 2d 601; *Tehan v. Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed. 2d 453; *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882; *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 19 L.Ed.2d 1199.

[10] *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1648, 6 L.Ed.2d 1081; and, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

1161 (1955), this Court made clear that what it was condemning in *Avery* was the "system of selection" and not any particular method by which it was carried out.

Thus considered, it is plain that *Whitus* made no change in law enforcement procedures or established any "new" line of authority, but was merely a case of applying time-honored and established principles to discriminatory techniques which had become slightly more covert. This Court's opinion in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), relied upon by the Georgia court does, in fact, show, by its distinguishing of other cases, that no concept of "retroactivity" is involved in circumstances such as those in the case at bar:

> "It is urged, however, that these same considerations apply in the cases that we have applied retrospectively in other areas, notably that of coerced confessions, and that the Mapp exclusionary rule should, therefore, be given the same dignity and effect. Two cases are cited, Faye v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) and Reck v. Pate, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961), but neither is apposite. It is said that we ordered new trials 25 years after conviction in the latter and after the lapse of 21 years in the former. This time table is true but that is all. The principle that a coerced confession is not admissible in a trial predated the arrests as well as the original convictions in each of these cases. See Brown v. State of Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L.Ed. 682 (1936). *There was no question of*

retrospective operation involved in either case." (Emphasis supplied.)

At least eleven years before *Whitus v. Georgia*, supra, the States, in general, and Georgia in particular, had been told that any trick, device, or arrangement of colored papers which had the effect of deliberate exclusion of a segment of the population from criminal juries was constitutionally intolerable, *Avery v. Georgia*, and *Williams v. Georgia*, supra. To hold the *Whitus* decision inapplicable to the case at bar because of a concept of "retroactivity" would not only distort the useful principles of retrospective *versus* prospective application, but would also encourage any state officials, who were so inclined, to engage in an interminable hare-and-hounds contest with this Court. It is obvious that the subtleties which may be employed to bring about the *result* of purposeful exclusion are as infinite as human imagination. If the reasoning followed by the Supreme Court of Georgia were to be approved by this Court, the important principle in *Whitus v. Georgia*, supra, would be whittled away to an intolerably narrow factual base, and a premium would be placed upon the ingenuity of the various evasions which might be devised by state officials inclined to perpetuate the old abuses.

We submit that this danger alone makes the case at bar worthy of the Court's consideration, notwithstanding the Georgia court's assurance that the method of jury selection has been changed. It was changed after *Avery* in 1952, but the old abuses continued. Viability can be given to this Court's *Whitus* principle only by striking down this conviction which resulted from this discredited practice.

It must be recalled that the system about which *Whitus* was complaining in his *original* habeas corpus was the *same* system about which the petitioner is now complaining. We would go further and urge this Court that, completely apart from *Whitus*, the conflict of the judgment below with *Avery* and *Williams* would be an adequate reason for granting of the writ and correction of the abuse. We think it is most likely that it was these precedents that the Court had in mind at the time of its per curiam reversal in *Whitus v. Balkcom*. In all events, the principle was sufficiently well established to require reversal when it was first raised in federal habeas corpus. See also, *Whippler v. Dutton*, __F.2d__ (CA 5, N° 24428, decided February 7, 1968) wherein the Court of Appeals for the Fifth Circuit apparently assumed the non-existence of any retroactivity question.

III. If Question of Retroactivity is Present, Rationale of Recent Cases Requires Retrospective Application of Whitus.

Assuming, *arguendo*, that any choice was present between retrospective and prospective application of the *Whitus* doctrine, we submit that the Georgia Supreme Court's rejection of retrospective application is probably not in accordance with the applicable decisions of this Court.

The most recent decision of this Court treating the problem of retroactivity is *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 19 L.Ed.2d 1199 (1967), in which new rules as to "line-up" identification were held not to be applicable to earlier cases. In so deciding, the Court set forth the

guidelines to be applied in determining the manner of application of a new rule:

> " * * * 'These cases establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application" * * * .' *Johnson*, supra, 384 U.S., at 726-727, 86 S.Ct., at 1777. The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) *the extent of the reliance by law enforcement authorities on the old standards*, and (c) the effect on the administration of justice of a retroactive application of the new standards. '[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background or precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.'." 87 S.Ct. at 1969-1970. (Emphasis supplied.)

Earlier in this petition we have denied that *Whitus* presented any "new" rule within the meaning of this language. Even, however, if it be considered a new standard, we think that the application of the Court's criteria above cited would require that the general principle of retrospective interpretation be followed.

With respect to criterion a), the purpose of the *Whitus* rule is to correct what the Court characterized as "the evil" (385 U.S. 545, 552) resulting from a "system of selection" which arbitrarily discriminated against a race or class of people. This new standard (which seems to petitioner very much like the old standard) may be "new" only in that it tends more to measure purposeful discrimination by the *results*, as seen in the jury box, rather than by the particular scheme of discrimination employed. It seems to us, therefore, that the purpose of *Whitus* (and the cases following it) was to place once and for all this Court's stamp of disapproval upon any method of jury selection which *resulted* in the exclusion of any eligible segment of the population from juries, or produced juries which were less than a fair cross-section of the community.

If *Whitus* is narrowed to a prospective application to the particular method there involved, the Court's purpose might well be thwarted. The prosecuting authorities might well devise new methods which would accomplish the old result, secure in the knowledge that prosecutions gained by such methods would be undisturbed.

Criterion b) —the extent of reliance by the authorities on the old standards— requires no elaborate argument. We know of no decision by this Court, or any other court, which —at least for the last fifteen years— could have lead the Georgia law enforcement authorities to believe that they were justified in discriminating against Negroes, or any other segment of the population, in selection of any grand or petit juries. Indeed, every indication that this Court gave, and especially *Avery* and *Williams*, should have compelled the opposite conclusion. No constitutional authority ever told the officials of Georgia that they could

purposefully exclude Negroes or include them only in token numbers.

This concept is sharply to be distinguished from cases such as *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). That case overruled the prior controlling decision of this Court, *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), upon which prosecuting authorities would certainly have been entitled to rely. Likewise *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) struck down the statutory privilege of commenting on the failure of the accused to testify —which had not theretofore been challenged by this Court.

Escobedo and *Miranda*[11] impliedly overruled *Crooker v. California*, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958) upon which law enforcement officials were justifiably entitled to rely.

Finally, there is criterion c) —the "effect on the administration of justice". We do not think that this standard refers to the expressed fears by the Georgia Supreme Court of a mass legalized jailbreak. We think that this Court had in mind the right of prosecuting authorities to rely upon apparently valid procedures considered in connection with any inherent unreliability in the discredited procedure. Applying this standard to the case at bar, we submit that the administration of justice would best be served by giving the *Whitus* rule retroactive application.

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[11] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694. *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977.

In the first place, as we have argued, there was nothing to justify Georgia authorities' supposing that they could continue systematically to exclude Negroes from juries, no matter how this was accomplished. To hold otherwise might well invite a reliance by Georgia officials on some new method of selection which would, nevertheless, accomplish the unlawful result.

The reluctance of Georgia courts to follow *Whitus* (see *Jones v. State*, 223 Ga. 157, 154 S.E.2d 228 (1967) would indicate that a definitive remedy is necessary to accomplish the constitutional result; otherwise five years from now this Court may, again, be presented with the complaints of racially imbalanced juries in Georgia. Retroactivity (if necessary) is, clearly, the method finally to prevent this from occurring.

Additionally, we feel that the exclusion of Negroes from juries in a case in which the state has injected the racial issue, does, indeed, affect the integrity of the fact finding process, within the meaning of *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908. That is to say, a racially imbalanced grand jury and petit jury, when coupled with at least one appeal to racial prejudice which can be proved by the trial record, does, in our view, create serious doubt that the indictment was returned by, and the trial was had before, the type of jury to which the Constitution entitled the petitioner.

As to the Georgia Supreme Court's fears that a hoard of white thieves, swindlers and felons would be set loose by application of the *Whitus* rule, we can only remind this Court of its statement that

" * * * we regard the fact that the parties in-

volved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." 87 S.Ct. 1967, at 1972.

This Court judicially knows that the administration of criminal justice has improved to an unprecedented degree by retroactive application of new principles in cases such as *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *McNerlin v. Denno*, 378 U.S. 575, 84 S.Ct. 1933, 12 L.Ed.2d 1041 (1964; and *Eskridge v. Washington State Prison Board*, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958). See also, *Swenson v. Donnell*, 382 F.2d 248 (CA 8, 1967) (wherein the Eighth Circuit decided that the rule of *Douglas v. California*, 372 U.S. 353, would be retroactive).

We doubt seriously that retroactive application would open the doors of jails in Georgia, since each defendant would have to carry the burden of proving an actual exclusion of some class of population, see *White v. McHan*, 386 F.2d 817 (CA 5, 1967). There may not have been discrimination in cases wherein the jury commissioners had performed their duty constitutionally, regardless of the make up of the tax digest.

We submit, however, that the retroactive application of *Whitus* —if required— is the only method by which this controversy, once and for all, may be put to rest.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

ARTHUR B. CUNNINGHAM
PHILIP T. WEINSTEIN
812 Ainsley Building
Miami, Florida 33132

HAROLD KARP
1317 William Oliver Bldg.
Atlanta, Georgia 30303

Attorneys for Petitioner

APPENDIX

SEPTEMBER TERM, 1967.

24391. STRAUSS v. GRIMES, Sheriff.

The trial court properly denied the appellant's petition for habeas corpus claiming unconstitutional composition of the grand jury which indicted him.

ARGUED NOVEMBER 15, 1967—

DECIDED NOVEMBER 22, 1967—

REHEARING DENIED DECEMBER 7, 1967.

Habeas corpus. Fulton Superior Court. Before Judge Pharr.

Harold Karp, Arthur Cunningham, Philip Weinstein, for appellant.

Lewis R. Slaton, Solicitor General, J. Robert Sparks, Carter Goode, J. Walter LeCraw, for appellee.

GRICE, Justice. Denial of a petition for habeas corpus, in which the petitioner claimed that the grand jury which indicted him was unconstitutionally composed, is the subject matter of this appeal. The petition was instituted by Robert L. Strauss against T. Ralph Grimes, as Sheriff of Fulton County, in the Superior Court of that county. Strauss had been indicted by the grand jury of the county for violation of the Georgia Securities Act, found guilty, and sentenced to 15 years imprisonment.

Petitioner, insofar as necessary to recite here, asserted

that he, a male white citizen, had not been accorded the type of grand jury to which the law entitles him in that it was not impartially selected from a cross section of the community. He claimed that it was drawn from a grand jury box illegally constituted because the jury commissioners used as their starting point a prior jury list from which Negro citizens of the county had been systematically excluded or disproportionately included, and also because the commissioners in completing the jury box used tax returns where taxpayers were segregated by race. He urged that this denied him due process of law and equal protection of the law, and that he had not waived his right to a constitutionally selected grand jury.

The respondent denied the essential allegations of the petition.

Upon the hearing the petitioner presented testimony as to the grand jury selection procedures and statistics with reference to numbers and percentages of whites and Negroes, seeking to bring the case within the ambit of Whitus v. Georgia, 385 U. S. 545 (87 SC 643, 17 LE2d 599), and other such decisions of the Supreme Court of the United States, upholding claims of systematic exclusion of Negroes from grand and petit juries. The jury commissioners in the case at bar explained the selection procedures employed here and denied any purposeful or intentional discrimination.

The trial court's judgment dealt adversely with each of the petitioner's contentions and remanded him to the custody of the respondent. The appeal is from that judgment.

Under our view of the case, we do not reach the claim of unconstitutional selection of the grand jury.

We do not believe that retroactive application of the Whitus case, 385 U. S. 545, supra, is required in the present case, where the grand jury indictment was returned December 22, 1964, and no challenge was made to the composition of the grand jury at the time of the trial, but was first made in a post conviction habeas corpus proceeding.

The Supreme Court of the United States has not made retroactive application of the Whitus principle to a situation where the attack on the grand jury was made after conviction. Those cases applying Whitus (Cobb v. Georgia, 389 U. S. 12 (88 SC 115, 19 LE2d 11); Jones v. Georgia, 389 U. S. 24 (88 SC 4, 19 LE2d 25); and Bostick v. South Carolina, 386 U. S. 479 (87 SC 1088, 18 LE2d 223)), dealt with attacks made before trial.

Furthermore, that court has ruled that four other standards for criminal investigations and court proceedings, recently established for the first time by it, should not be applied retroactively. They relate to (1) search and seizure in Mapp v. Ohio, 367 U. S. 643 (81 SC 1648, 6 LE2d 1081), held not retroactive in Linkletter v. Walker, 381 U. S. 618 (85 SC 1731, 14 LE2d 601); (2) comment on failure to testify in Griffin v. California, 380 U. S. 609 (85 SC 1229, 14 LE2d 106), held not retroactive in Tehan v. Shott, 382 U. S. 406 (86 SC 459, 15 LE2d 453); (3) confession without benefit of counsel in Miranda v. Arizona, 384 U. S. 436 (86 SC 1602, 16 LE2d 694, 10 ALR3d 974), held not retroactive in Johnson v. New Jersey, 384 U. S. 719 (86 SC 1772, 16 LE2d 882); and (4) "line up"

identification in United States v. Wade, 388 U. S. 218 (87 SC 1926, 18 LE2d 1149), and Gilbert v. California, 388 U. S. 263 (87 SC 1951, 18 LE2d 1178), held not retroactive in Stovall v. Denno, 388 U. S. 293 (87 SC 1967, 19 LE2d 1199). Since the impact of those principles upon the administration of criminal justice was deemed such as to preclude retroactive application, surely the impact of the claim here—a white man's contention that the indictment was void because Negroes were systematically excluded from the grand jury which indicted him—also warrants the denial of such application.

The observations that retroactive application in such situations would "seriously disrupt the application of our criminal laws" (Johnson v. New Jersey, 384 U. S. 719, supra) and "would have a serious impact" upon the area affected (Stovall v. Denno, 388 U. S. 293, supra) are understatements indeed. If so applied, every convicted murderer, rapist, robber, thief, swindler, and all other felons of the white race, no matter how long ago indicted and convicted, could make the same claim and possibly be set free, unless again indicted and convicted. Due to inaccessibility of witnesses and their failing memories as to essential facts, hordes of such criminals would be turned loose upon society.

It should be added that in response to the criticism in the Whitus case, 385 U. S. 545, supra, decided January 23, 1967, Georgia acted promptly. By an Act approved March 30, 1967, it radically changed the method of grand and petit jury selection. Ga. L. 1967, p. 251.

Judgment affirmed. All the Justices concur.

GEORGIA STATUTORY PROVISIONS

Code §59-106. Revision of jury lists. Selection of grand and traverse jurors. — Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 60 days thereafter, the board of jury commissioners shall revise the jury lists.

The jury commissioners shall select from the books of the tax receiver upright and intelligent citizens to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright citizens to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead.

Code §59-201. Qualifications of Grand Jurors; incompetency of certain public officers to serve. — All citizens of this State, above the age of 21 years, being neither idiots, lunatics, nor insane, who have resided in the county for six months preceding the time of serving, and who are the most experienced, intelligent, and upright persons, are qualified and liable to serve as grand jurors, unless exempted by law: Provided, however, that county commissioners, tax receivers, tax collectors, members of the county board of education, county school commissioners, ordi-

naries, and county treasurers shall be incompetent to serve as grand jurors during their respective terms of office.

Code §92-6302. Lists for tax returns; incorporation and arrangement of questions. — It shall be the duty of the State Revenue Commissioner when he causes to be printed the lists which are to be presented to the taxpayer, to incorporate therein the questions provided in section 92-6215, and to so arrange them as to require a separate answer to each question. He shall include any other question in said lists which in his judgment will cause a fuller return of and reach property subject to taxation under the laws of this State, and shall omit from said lists such questions as are more explicitly covered and set forth in this Title.

Code §92-6307. Entry on digest of names of colored persons. — The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order. Names of colored and white taxpayers shall be made out separately on the tax digest.

EXCERPTS FROM THE OPENING STATEMENT BY THE PROSECUTION AT THE ORIGINAL TRIAL OF THIS CAUSE

OPENING STATEMENT BY MR SPARKS (COUNSEL FOR THE STATE):

Lady and gentlemen of the jury, my name is Bob Sparks, and I am the Assistant Solicitor General who will

be presenting this case to you. This is an opening statement as to what the State expects to prove in the case, and I want to warn you that it is not evidence, and it will not be construed as evidence by you. I find that it generally helps the jury and the jury can follow the evidence a little bit better, if the Solicitor General at the outset of the case will give you a brief outline of what he expects to prove. I won't attempt to go into it in detail, and I will only try to hit the high spots. And again, as I say, I will attempt to prove what I shall state to you in my opening statement; however, my statement here is not testimony. And you will take the testimony from the witnesses as they testify from the stand. I might have some inaccuracy in my opening statement, because, as you have probably gathered already, this is a most extremely complicated case. So don't hold me too closely to the exact language of what I am telling you the State expects to prove in the case. The evidence will come from the stand and not from me and not from the defense counsel either.

You have heard the indictment read to you, and it is a lengthy indictment, and it sets out pretty much in detail the alleged scheme the State is going to prove to you or attempt to prove to you. However I do want to point out just a few things. I am not going to attempt to cover in detail the lengthy indictment

[04403]

Discount Company and several other corporations in which Mr Strauss was financially interested and which he and Mr Townsend controlled and operated. I expect to show you that these overdraft balances on each of those sheets added up to hundreds and thousands of dollars for each

day. And the State will rely upon that in great degree to show personal knowledge on the part of Mr Strauss that for several months that the accounts were vastly overdrawn, and that he was operating a check kite.

I expect to show you further that these money orders were clearing through the Crown Savings Bank in Newport News, Virginia, and *I expect to show you that is an all or was an all Negro bank.* I expect to show you that the man, the cashier of that bank, a man named Frank Dallas Jackson, was receiving money from Mr Strauss sent through the mail. I expect to show you that once a week for twelve weeks he received one hundred dollars a week from Mr Strauss in envelopes bearing the return address of Federal Mortgage and Discount Company, which was Mr Strauss' office. Mr. Strauss and Mr Townsend were operating out of the same office. I expect to show you that those were mailed to Frank Dallas Jackson at a post office box in Newport News, Virginia. And Frank Dallas Jackson is charged as a defendant in this case, but I expect to, or I will state to you now that the Solicitor General of Fulton County has granted immunity from prosecution in this case to Frank Dallas Jackson, and he will appear as a witness to testify as to his dealings with Mr. Strauss. (Emphasis Supplied)

[04406]

thereby caused that account to be overstated in that amount, in other words, it showed that in the Crown Savings Bank that there was two hundred and twenty-two thousand dollars more than there was actually on deposit there.

I expect to show you too [sic] that Mr Frank Dallas Jackson, the cashier of the bank up there, had daily conversations with Mr Strauss, that he would call Mr Strauss daily or Mr Strauss would call him daily from Atlanta, and he would tell Mr Strauss how much money was needed to clear the money orders which were arriving that day. For example, you need forty-two thousand dollars deposited to clear, we have got forty-two thousand dollars worth of money orders here that we have got to clear today, to pay.

I expect to show you that the money order companies had established an account in a local bank here, the Citizens Trust Company, which is *also a Negro bank here in Atlanta*, in the name of the Crown Savings Bank, and they were ostensibly making their deposits locally there, and then by debit memorandum they could transfer it to the account, debit or credit memoranda they could transfer it to the account up in Newport News.

I expect to show you that when Mr Jackson would call Mr Strauss and tell him that you need so much money to cover the money orders, Mr Strauss would tell him, well, I am going to make a deposit this afternoon. I expect to show you that Mr Jackson would then call the Citizens Trust, the Citizens Trust here in Atlanta and say, have the money order companies made a deposit to (Emphasis Supplied)

[04409]

Strauss vs. *State of Georgia;* Supreme Court,

Case No. 24298

CERTIFICATE OF SERVICE

IT IS HEREBY certified that two true and correct copies of the within and foregoing Petition for Writ of Certiorari, and Appendix, have been mailed by prepaid airmail to the Hon. LEWIS R. SLATON, Solicitor General, Fulton Judicial Circuit, Fulton County Courthouse, Atlanta, Georgia, and two additional copies have been mailed by prepaid airmail to the Hon. ARTHUR K. BOLTON, Attorney General of the State of Georgia, 132 Judicial Building, Atlanta, Georgia, this ..... day of March, 1968.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1227

ROBERT L. STRAUSS,
Petitioner

v.

T. RALPH GRIMES, Sheriff of Fulton County, Georgia,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

J. WALTER LECRAW
Assistant Solicitor General
Atlanta Judicial Circuit

PAUL GINSBERG
Assistant Solicitor General
Atlanta Judicial Circuit

J. ROBERT SPARKS
Assistant Solicitor General
Atlanta Judicial Circuit

LEWIS R. SLATON
Solicitor General
Atlanta Judicial Circuit
Counsel for Respondent

Fulton County
Courthouse
Atlanta, Georgia 30303

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 1227

ROBERT L. STRAUSS,

Petitioner

v.

T. RALPH GRIMES, Sheriff of Fulton County, Georgia,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Respondent respectfully files this Brief opposing the above stated Petition and urges this Honorable Court to deny same for the reasons hereinafter set forth.

OPINIONS BELOW

Petitioner has correctly cited the decision of the Supreme Court of Georgia which is sought to be reviewed as 223 Ga. 384, 158 S.E. 2d 404, and has included it in his Appendix. Respondent cites the cases of *Strauss v. State*, 113 Ga. App. 90, 147 S.E. 2d 367, and *Strauss v.*

State, 116 Ga. App. 154, 156 S.E. 2d 543, and has set forth both of these decisions in Appendix I and Appendix II respectively, infra, pp. 40-46. The pertinency of these decisions will be discussed in another portion of this Brief.

JURISDICTION

Respondent concedes the jurisdiction of this Honorable Court to review the decision of the Supreme Court of Georgia in the instant case.

QUESTIONS PRESENTED

Respondent cannot agree with the wording of any of the three questions as set out in the Petition, because each assumes as true most material facts which Respondent insists were not proved by the evidence in the *habeas corpus* proceeding in the Superior Court, and which also are not pertinent to the issues in this case, in view of the extremely limited scope of the decision of the Supreme Court of Georgia which is sought to be reviewed.

Therefore, Respondent respectfully insists that the entire issue before this Honorable Court can be properly summed up in the following question:

1. Whether the ruling in *Whitus v. Georgia,* 385 U.S. 545 (1967) should be applied *retroactively* in the instant case where:

(a) No attack was made *prior* to jury trial upon the composition and method of selecting the Grand Jury which indicted Petitioner, and where the *first* such attack was made *collaterally* by State habeas corpus proceedings only *after conviction* of Petitioner and the subsequent *dismissal of his appeal.*

(b) Such a decision applying *Whitus,* supra, retroactively to *collateral attack* would afford *all* criminals now serving sentences in Georgia who were convicted upon indictments returned prior to January 29, 1967, the date of the *Whitus* decision, the opportunity to successfully attack their own convictions collaterally, and would thus have a serious impact – if not indeed a disasterous one – upon the application of criminal laws and the protection of the public in the entire State of Georgia, the area affected.

(c) The State of Georgia reacted immediately to the criticism in *Whitus* of its laws regulating the selection of jury lists from segregated tax digests by promptly repealing such laws on March 30, 1967, a little more than two months after *Whitus,* and prescribing an entirely new method of jury list selection which completely eliminates even the *possibility* of discrimination against prospective jurors because of their race or creed.

There is a second question which might *possibly* be involved in this case, as follows:

2. Whether Petitioner, as a *white* man, may complain of an alleged disproportionate number of *Negroes* on the Grand Jury which indicted him, where the crime charged, i.e. violation of the Georgia Securities Act, is a crime directed against the general public, of all races and creeds, and has no racial issues or overtones, and where no racial issues were injected into his subsequent jury trial.

We say this is a "possible" question, because the decision of the Supreme Court of Georgia was based solely upon the non-retroactive application of *Whitus* and not

upon the race of the Petitioner. However, the Superior Court did find that Petitioner as a white male has "not shown any harm to or discrimination against him". (R. 30).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those statutes enumerated in the Petition and set out in Petitioner's Appendix, the new act of the Georgia General Assembly in response to *Whitus* is involved, and is set out in Respondent's Appendix III, pp. 47-48, being Ga. Law 1967, p. 251, approved March 30, 1967.

STATEMENT

We are generally in agreement with most of the summation in Petitioner's Statement *of the evidence* adduced in the Habeas Corpus hearing, but we disagree with many of the conclusions drawn therefrom by Petitioner. For the sake of brevity, we will not re-outline the evidence as set out by Petitioner, but will simply correct mis-statements and supplement Petitioner's Statement by calling attention to evidence not mentioned by him in his Statement.

First, we wish to correct Petitioner's Statement on page 4 of his Brief that Petitioner asserted in this habeas corpus "that the grand jury which returned the indictment, *and the Petit Jury which convicted him,* had been made up — on an illegal and unconstitutional basis" (emphasis added). This statement is completely misleading, no doubt inadvertently so. No attack whatever was made in the hearing upon the *Petit Jury* which convicted Petitioner. Not one word of evidence was offered as to any disproportionately small number of Negroes on

the Petit Jury panels from which the traverse jury that convicted Petitioner was selected. In fact, that phase of the habeas corpus petition as amended was impliedly abandoned during the hearing, since no figures of any description were put in evidence about the composition by race of either the actual twelve trial jurors and two alternates or the more than 150 traverse jurors who were examined by counsel during selection of the jury. Indeed, Petitioner could hardly afford to go into the composition of those traverse panels which contained large number of Negroes. We wish to make it clear, in any event, that *this case deals solely with Grand Jurors,* and not with traverse jurors in any sense.

At this point, Respondent's counsel points out that we have no copy of the Record as certified to this Court by the Supreme Court of Georgia, and no such copy was retained by that Court. Neither can we precisely reconcile the records of the Superior Court available to us with the pages of the Record cited by Petitioner in his Brief. We are therefore unable to precisely document our subsequent references to the record of testimony in the *habeas corpus* hearing by use of the prescribed letter "R". We will have to document our references to that testimony by citing the transcript (T), using the page numbers appearing at the bottom of each page of said transcript of testimony.

We wish to supplement Petitioner's Statement by pointing out that Attorney LeRoy Hobbs, who testified as a defense witness, admitted that he was present during Petitioner's trial for some five or six days and as far as he knew, there was no issue in the trial involving race (T58).

Further, Petitioner admitted on cross-examination that

he was not a member of the NAACP, or the Student Non-Violent Coordinating Committee; that he had never taken any part in registering Negroes to vote or helping them get on or off juries; and that he had never been identified in any way with the "so-called civil rights movement" (T61-62).

Petitioner further admitted that there was one Negro man who testified in the trial that he had lost some money and that the bank officials who testified in the jury trial were Negroes (T63-64). This evidence is pertinent because of the allegations in Petitioner's Brief (at page 18) and in his Appendix (pp. 6-9) that the State tried to inject the racial issue into the jury trial. We will discuss this gross distortion of the actual facts later in this Brief.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Facts In This Case are Clearly Distinguishable in Several Ways from those in *Whitus v. Georgia*, 385 U.S. 545, and Cases Following Whitus.

(a) The issue of alleged jury discrimination was raised collaterally instead of prior to trial and on Direct Appeal.

First, the attack upon the composition of the Grand Jury which indicted Petitioner in 1964 is made *collaterally* by State habeas corpus. It was made *for the first time* after the jury trial of Petitioner, his conviction and the subsequent dismissal of his appeal (Petitioner's Brief, pp. 3-4).

In each of the recent decisions of this Court relied upon by Petitioner the composition of *both* the Grand

Jury and the Petit Jury was challenged *prior to trial* by timely pleas in abatement of the indictment and challenges to the array of traverse jurors. See *Whitus v. Georgia,* supra, 385 U.S. 545 at 547, and the cases as reported below, *Whitus v. State,* 112 Ga. App. 328, 145 S.E. 2d 83 (challenge to grand jury array before indictment) and *Whitus v. State,* 222 Ga. 103, 149 S.E. 2d 130 (challenge to the array of petit jurors); *Jones v. Georgia,* 389 U.S. 24, 88 S.Ct. 4, L.Ed. 2d , Oct. 16, 1967, and the case as reported below, *Jones v. State,* 223 Ga. 157, 154 S.E. 2d 228 (plea in abatement prior to trial attacking grand jury composition, and challenge to the array attacking composition of traverse jury list); *Cobb v. Georgia,* 389 U.S. 12, 88 S.Ct. 115, L.Ed. 2d (1967) and the case as reported below, *Cobb v. State,* 222 Ga. 733, 152 S.E. 2d 403 (challenges to the arrays of both grand and traverse juries plus special demurrer to the indictment); *Sims v. Georgia,* 389 U.S. 404, 88 S.Ct. 523, L.Ed. 2d , (1967), and the case as first reported below, *Sims v. State,* 221 Ga. 190, 144 S.E. 2d 903 (challenge to the array, plea in abatement of the indictment and motion to quash indictment); and *Anderson v. Georgia,* 36 Law Week 3344 (March 15, 1968) and the case as reported below, *Anderson et al v. State,* 223 Ga. 174 (1967), 154 S.E. 2d 246, (motion to quash indictment and challenge to array of traverse jury).

In another case decided so recently that it is not cited by Petitioner, *Sullivan v. Georgia,* 1131 Misc., 36 Law Week 3365, (decided March 19, 1968), the Petitioner in that case also attacked the composition of both the grand jury and petit jury *before trial* by a motion to quash the indictment and sustain a plea of abatement on the

grounds that *both* the grand and traverse juries were illegally constituted. See the case as reported below, in *Sullivan v. State,* 223 Ga. 643, 157 S.E. 2d 247.

Thus, the opinions of the Georgia Appellate Courts, in conjunction with some of the opinions of this Court, show that direct challenges to the composition of both the grand and petit juries were made *prior to trial* in each of the foregoing cases. Therefore, this case stands *alone* as the very first Georgia case in which it is sought to apply *Whitus* retroactively to a collateral attack on the *grand jury only* after final conviction by a petit jury, the composition of which was never attacked.

(b) This Case is a Non-racial One where a White Man Seeks to Attack an Alleged Disproportionate Number of Negroes on the Grand Jury Which Indicted Him.

Despite the strained efforts of Petitioner to inject a racial issue into this case, there is none. This was a prosecution for a violation of the Georgia Securities Act involving a gigantic swindle of the general public through the sale of worthless commercial money orders. See the opinion of the Court of Appeals of Georgia in *Strauss v. State,* 113 Ga. App. 90, which is set out verbatim in Respondent's Appendix I, pp. 40-45. Here the Petitioner tested the legal sufficiency of the indictment against him prior to trial (without raising the *Whitus* Grand Jury question, however). This opinion sets out in detail the conspiracy alleged, involving many acts of fraudulent misrepresentations, falsification of bank records of the Crown Savings Bank in the amount of $205,000.00, fraudulent transfers between bank accounts, a massive "check-kite" and the collection of money in excess of $118,000.00 from agents selling the money orders *after*

the Crown Savings Bank (the bank used by the conspirators for payment of the money orders) had been closed, resulting in the defrauding of purchasers of these money orders caused by the Petitioner's refusal to refund this money to them. The legal sufficiency of the indictment was upheld by the Georgia Court of Appeals.

In the interest of brevity, we will not further summarize the details of the vicious scheme by which this Petitioner defrauded thousands of impoverished persons who bought his worthless money orders. However, we respectfully urge this Honorable Court to study carefully the opinion set out in our Appendix I. The recitation of the fraudulent scheme alleged in the indictment, which was proven in every detail upon the trial, show conclusively that there was no racial issue in this trial, and that Petitioner Strauss could in no way have been harmed by having only one Negro on the Grand Jury which indicted him.

In fact, an all-Negro Grand Jury would probably have been equally as quick to indict as the one which indicted him, because it is reasonable to assume that the majority of these defrauded money order purchasers were Negroes, since as a rule only poor people without bank accounts use commercial money orders to pay their obligations. Also, the Crown Savings Bank, an all-Negro Bank (Petitioner's Brief, Page 18 and Appendix, 6-9) collapsed and failed in large part because of the devious schemes, "check-kites" and falsification of bank records perpetrated by Petitioner and his codefendants.[1]

---

[1]So stunning was the failure of this bank that an exhaustive investigation was made in public hearings by the United States House of Representatives. See the "Investigation into Crown Savings Bank Failure", Hearings Before the Subcommittee on

In strong contrast to the non-racial aspects of this case is the definite racial overtones and possible racial prejudices inherent in *Whitus* and the cases following it. In *Whitus,* a Negro was charged with the murder of a white man. In *Jones,* a Negro was charged with the murder of a white woman. In *Cobb,* a Negro was charged with the murder of a white man. In *Sims,* a Negro was charged with the rape of a white woman. In *Anderson et al,* about 200 "colored persons" were engaging in a "freedom march" in Crisp County, Georgia, and two of the marchers attempted to lower the American flag, tearing it in the process, because "the Negro community was in a state of mourning." (223 Ga. at 179). In *Sullivan,* a Negro was charged with the murder of a white man. All of these foregoing cases relied upon by Petitioner posed definite racial issues – this case had none.

(c) Composition of the Grand Jury only is Challenged Here.

Petitioner here has challenged *only the Grand Jury* which indicted him and *not* the composition of the *traverse jury* which convicted him, as contrasted with *Whitus* and the cases previously cited which follow the *Whitus* ruling. Each of those cases challenged both the composition of the grand *and* traverse juries. We feel there is a real distinction between an attack upon alleged *grand jury* discrimination *only,* and an attack upon the traverse jury or upon *both* the grand and traverse juries.

Domestic Finance of the Committee on Banking and Currency, House of Representatives, Eighty-Ninth Congress, First Session, July 20-August 6, 1965, as printed by the U.S. Government Printing Office, *where Petitioner Strauss refused to answer questions and plead immunity under the Fifth Amendment approximately 128 times* (pp. 383-395).

In *Whitus,* this Court was dealing primarily with an instance of an alleged *illegal petit jury box*. The opinion by Justice Clark sets forth in the third paragraph that *"a challenge to the array* of petit jurors" was presented before trial, and denied. The decision held that the challenge to the grand jury was also involved in the appeal, so this Court considered both the Mitchell County petit jury list and the grand jury list.

Having consolidated the two questions into one question, the *Whitus* decision then proceeds to consider it from an overall standpoint. After considering the fact that the Mitchell County tax digest sheets were used by the jury commissioners and that those sheets were of different colors for white and Negro taxpayers, and considering some statistics which were proven showing that the percentage of Negroes on the jury venires was noticeably smaller than the percentage of Negro taxpayers, this Court declared that "under such a system the *opportunity for discrimination was* present and *we cannot say* on this record *that it was not* resorted to by the commissioners."

By means of this *double negative,* this Court reversed the case and sent it back to Georgia "for further proceedings not inconsistent with this opinion." By our re-referring to it as a *double negative,* we mean to point out that this Court did not hold that there *had been* "purposeful discrimination" against Negroes, as the Strauss habeas corpus alleges and as the Petitioner's Brief contends, but this Court only held that there was a "presumed discrimination" in view of all the facts shown in the *Whitus* record.

It is unfortunate that this Honorable Court did not reach the question of the alleged illegality of the *grand*

jury, as a distinct question separate from the alleged illegality of the petit jury as a ground for appellate court reversal, because exclusion from a grand jury is not as serious as exclusion from trial juries. *United States v. Harpole,* 5 Cir. 1959, 263 F.2d 71. In that case, involving conviction of a Negro of murder of a white person, with death penalty, in Mississippi, there was no objection at the State trial to the indictment, nor to the composition of the grand jury, nor to the petit jury panel. But in Federal habeas corpus later these subjects were raised and it was contended that the grand jury and the petit jury panels were illegal because of discrimination against Negroes. Discussing the question at considerable length, and the fact that white counsel at the trial had failed to raise the questions at the trial that grand jury and petit jury panels were illegal because of discrimination against Negroes, the Fifth Circuit Court of Appeals held that as to the *petit jury* discrimination the Negro defendant should not be held to have waived the right to object, but that "the objection to the grand jury was waived and the appellant is now legally detained upon his indictment for murder" (263 F.2d at 84).

In ruling that discrimination in the formation of the grand jury was not as serious to the defendant as discrimination in the petit juries, and that the question might be considered as waived as to the grand jury, the Fifth Circuit said, in part:

> "The U.S. Constitution does not guarantee to a defendant in a state court a trial before a jury in which his own race is proportionately represented, nor a trial before a jury composed in any part of members of his race, nor even to a jury trial at all, if other defendants are not accorded a jury trial . . ."

See also *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824,

13 L.Ed. 2d 759, holding that there is no requirement that the grand jury box from which a grand jury is drawn shall be proportionate as between the races.

The *Harpole* case, supra, also quoted approvingly (on page 80) the following language by Justice Jackson dissenting in *Cassell v. Texas,* 339 U.S. 282, 301, 70 S.Ct. 629, 94 L.Ed. 2d 839, as follows:

> ". . . A trial jury on which one of the defendant's race has no chance to sit may not have the substance, and cannot have the appearance of impartiality, especially when the accused is a Negro and the alleged victim is not.
>
> "The grand jury is a very different institution. The States are not required to use it at all. *Hurtado v. Calif.,* 110 U.S. 516. *Its power is only to accuse,* not to convict. Its indictment does not even create a presumption of guilt; all that it charges must later be proved before the trial jury, and then beyond a reasonable doubt. . . ."

Applying the foregoing cases to the gigantic fraudulent scheme alleged against Petitioner (as recited in Appendix I of Respondent), it is clear beyond question that almost any conscientious Grand Jury, be it composed in its entirety of white persons, of Negroes, of Chinese or of Puerto Ricans would have returned an indictment against Petitioner, if sufficient evidence was given it to show probable cause that Petitioner was guilty.

A more serious question might have been presented if this case posed an alleged disproportionate number of Negroes on the *traverse* jury which convicted Petitioner and fixed a *15 year* total sentence. But this Petition deals *solely* with the *grand jury*. We respectfully insist that an

alleged disproportionate number of Negroes is not nearly so serious in a grand jury as in a traverse jury. The indictment returned by a grand jury is not an adjudication of guilt. It is not evidence against the defendant. Its sole function is to bring the indicted defendant into Court. An indictment simply says, "We find there is sufficient evidence to warrant the trial of this defendant before a petit jury." On the other hand, the traverse jury determines controverted issues of fact, decides the guilt or innocence of the defendant, and in Georgia fixes the punishment to be imposed upon the defendant whenever a guilty verdict is returned. And this record is completely devoid of any evidence of alleged discrimination against Negroes on the *petit* jury which convicted Petitioner. Any real harm or prejudice to Petitioner would have resulted from the composition of the petit jury – not of the grand jury.

In summary, we point out that this case is distinguishable from *Whitus,* and cases following, in three respects, to-wit: (1) It attacks the composition of the grand jury collaterally instead of prior to trial (2) It is a non-racial case involving a white defendant charged with a fraudulent scheme diverted against the general public and (3) It attacks *only* the *grand jury* composition and *not* the composition of the *traverse* jury.

II. The State did not Wilfully Inject any Racial Issue into the Jury Trial as Asserted by Petitioner.

Petitioner's counsel should be well-aware that there was no racial issue involved in the jury trial of Petitioner. Two Negro banks were used as the instruments of Petitioner's fraud and one failed as a result thereof. Negro citizens were defrauded by purchasing Petitioner's worthless money orders and Negro bank witnesses

testified for the State (T63-64). Attorney LeRoy Hobbs, a member of Attorney Harold Karp's own law firm, testified there was no issue involving race in the trial so far as he knew (T57-58).

Nevertheless, counsel for Petitioner continue to harp upon an obviously spurious effort made by *defense counsel* at the very outset of the month-long jury trial *to make it appear* that the State prosecutor, J. Robert Sparks, *was* injecting race into the case.

Petitioner says on Page 18 of his Brief (and also adds an Appendix to support his argument) that Mr. Sparks made "an appeal to the coarsest kind of prejudice against people who deal, or do business, with Negroes" in his opening statement to the jury outlining his expected evidence. This claim of the injection of racial prejudice into the trial is based *solely* upon Mr. Sparks' *identification* of the two banks utilized by Petitioner in his tremendous fraud as "an all Negro bank" (referring to the Crown Savings Bank, Newport News, Virginia, which Petitioner helped collapse) and "which is also a Negro bank here in Atlanta" (referring to the Citizens Trust Company). See Petitioner's Appendix, pages 8, 9. These words "all Negro bank" and "also a Negro bank" are the sole words which Petitioner claims injected a racial issue into this case. It is not claimed that the prosecuting attorney made any disparaging or insulting remarks about "people who deal with Negroes" or that he uttered any insults, innuendoes, or coarse remarks about either Negroes, Negro banks, or people who do business with such banks. Indeed, Petitioner's Appendix (pages 8, 9) shows *affirmatively* that no such racial remarks were made by the prosecuting attorney.

We freely admit that the two banks *were* identified by

Mr. Sparks as "all Negro" and "Negro" exactly as set forth in Petitioner's Appendix. However, we emphatically deny that such words were intended to inject any racial prejudice into the trial, or that they did in fact do so. Mr. Sparks knew that he would use various officials from those banks as witnesses and that they would all be Negro citizens; therefore, his designation of the banks as Negro ones in his opening statement clarified for the jury the reason why all bank witnesses to appear before them would be of the Negro race, rather than all white, or a mixture of both races. Secondly, there was a real necessity to identify the Atlanta bank, i.e., the *Citizens Trust Company,* for the jury, because there are two other banks in Atlanta having somewhat similar names. These are the *Trust* Company of Georgia, and the *Citizens* and Southern National Bank. The "Citizens Trust Company" name is a combination of parts of the names of these two larger banks, and the jury could easily have become confused as to *which* Atlanta bank the prosecuting attorney was referring.

These allegations of Petitioner of deliberate State injection into the trial of a racial issue are clearly misleading to this Honorable Court, since Petitioner has completely failed to include in his Appendix, or to even refer to the proceedings which took place *immediately after* this opening statement. We will therefore attach as Respondent's Exhibit IV the transcript of portions of the proceedings immediately after Mr. Sparks concluded his opening statement to the jury (pp. 49-51), and summarize those proceedings here.

Defense Attorney Wesley Asinof moved for a mistrial, *in the absence of the jury,* (Respondent's Appendix IV, p. 49) because of the Solicitor's reference to these

two banks as being "Negro banks". The Solicitor disclaimed any intention of injecting prejudicial racial matter into the trial (Respondent's Appendix IV, pp. 49-50) and stated that he was simply identifying the banks, as he would have Negro employees from the banks as witnesses for the State. *The Court then recalled the jury,* where the following took place:

THE COURT: "Lady and gentlemen, of the jury, the Solicitor General, Mr. Sparks, the Assistant Solicitor General, in his opening statement referred to two banks as being all Negro banks. *Do not let that statement of the Solicitor General prejudice your mind one way or another against the defendant on trial in this case.* I shall hear from you, Mr. Sparks".

MR. SPARKS: "Your Honor, I meant no racial prejudice at all in making the statement. *I was simply trying to identify the banks,* one being an Atlanta bank and one being a Virginia bank. A number of witnesses will appear from each of the banks, *and they will be persons of the Negro race,* and I was simply attempting to identify the banks. *I did not mean any racial connotation. I did not intend to install any racial prejudice or inject any racial prejudice into the case. And if I did, I apologize to the jury, and I apologize to the Court. And I ask the jury not to consider that remark and to forgive me for having made it. And I state again that I did not intend any racial prejudice* in the case because witnesses, *both Negro and white,* will appear for the State *equally.*"

THE COURT: "As I have previously stated, lady and gentlemen, *do not let that statement with reference to the banks being owned by Negroes influence your minds one way or the other.* We are trying this case upon the evidence and the evidence alone. I shall overrule your

motion. You may call your first witness". (State's Appendix IV, p. 51).

After the foregoing action by the Court, both prior to and following the Solicitor's explanation of his opening statement and his apology to the Court and jury, trial defense counsel *did not renew his motion for mistrial or request any further instruction or corrective action by the Court,* and the first witness was sworn (Respondent's Appendix IV, p. 51). Obviously the trial defense counsel was satisfied with the action of the Solicitor and the Court. It is in fact difficult to see where any racial prejudice could have been injected in the trial simply by the Solicitor's identifying two banks through which the Petitioner operated his fraudulent scheme as being Negro banks. If any possibility of racial prejudice existed, it was certainly completely eradicated by the explanation and apology of the prosecuting attorney to the jury, and the instruction of the Court, twice stated, that the jury would not consider the Negro ownership of the banks. This is the sole matter that Petitioner can point to in a month-long trial to show any racial overtones, and it is completely insignificant.

We feel that Petitioner has been less than candid with this Honorable Court by categorically stating that racial prejudice was injected into the trial by this opening statement, without calling to this Court's attention in any way the foregoing proceedings which clearly eliminated any possibility of racial prejudice being attributed to these statements. It has been left to Respondent to bring to the Court's attention the whole truth about this claim of racial prejudice.

In retrospect, the defense motion for mistrial appears to be more in the nature of a tactical move by the ex-

tremely able defense counsel to throw the prosecuting attorney off-stride at the very commencement of his case than any real concern that a racial issue had been introduced into the trial to his client's detriment. He did not even renew his mistrial motion after the apology by the Solicitor to the jury and the Court's corrective action. He undoubtedly was well-aware of the Georgia rule that where a motion for mistrial is made, and the trial court instructs the jury to disregard and not to consider the alleged error or statement upon which such motion was based, if the motion for mistrial is not renewed or further instructions to the jury are not requested after such corrective action by the Court, an assignment of error upon appeal based on the denial of the motion for mistrial presents nothing for review. *Kendrick v. Kendrick,* 218 Ga. 460, 128 S.E. 2d 496; *Barnes v. State,* 111 Ga. App. 348, 141 S.E. 2d 785; *Jones v. Parrott,* 111 Ga. App. 750, 143 S.E. 2d 393; *Purcell v. Hill,* 220 Ga. 663, 141 S.E. 2d 152; and *Ivey v. State,* 220 Ga. 699, 703-4, 141 S.E. 2d 541, 545. Therefore, he was precluded from asserting error in his direct appeal which was dismissed and did not attempt to do so. Instead, this dead issue has been resurrected in an attempt to convince this Court that Petitioner Strauss was the victim of some sort of racial plot in Georgia, and was actually prejudiced by having only one Negro on the Fulton County Grand Jury which indicted him.

The matters contained in Respondent's Appendix IV were also before the Supreme Court of Georgia in response to another identical Appendix of Petitioner. Also, the Georgia Supreme Court had access to the trial record on file in its own Court and in the Court of Appeals

where the direct appeal was dismissed and certiorari was denied by the Georgia Supreme Court.

In summary, we earnestly insist that this claim of "actual prejudice" is a totally spurious one, resorted to by Petitioner as a "last-ditch" effort to somehow drag this case into the racial setting of *Whitus* and cases following it. We urge this Court to view this case in its true context — a white man being prosecuted for a gigantic swindle of the general public and using two Negro banks as his unwitting tools (and breaking one Negro bank in the process).

Finally, this claim of racial prejudice through the prosecutor's opening statement would appear to be *res judicata* now, in view of the dismissal of Petitioner's direct appeal by the Court of Appeals (Respondent's Appendix II, p. 46). In this connection, although the appeal *was* dismissed *sua sponte* as stated by Petitioner (Brief, p. 3), the reason for such dismissal was the failure of the Petitioner to *either* file the record in the Court of Appeals of Georgia within 30 days after his Notice of Appeal *or* to request and obtain a court order enlarging the time for filing the record with that Court (See Respondent's Appendix II). It was not an arbitrary or capricious dismissal of the appeal, as might be inferred from Petitioner's Brief.

We therefore respectfully insist that there was no racial aspect or issue in this case, either before the grand jury or in the actual jury trial, by which any actual prejudice was shown to Petitioner, a white man, by any alleged disproportionate number of Negro citizens on the grand jury which indicted him.

III. The Application of Whitus Retroactively to Collateral Attack in this Case would Seriously Disrupt the Judicial and Penal Systems of Georgia.

This case was tried in September and October, 1966, and Petitioner was convicted by the trial jury on October 12, 1966 (Petitioner's Exhibit B, R 98) — a full three months before this Court's decision in *Whitus*. As previously pointed out, no attack was made on either the Grand Jury or upon the composition of the traverse jury panels from which the trial jury was selected. The issue of alleged disproportionate inclusion of Negroes on the Grand Jury was not raised at all. It was first raised after final conviction of Petitioner (dismissal of his appeal for failure to timely file the record) by State habeas corpus action. This poses the question of whether *Whitus* should be applied retroactively to collateral attack after final conviction.

(a) Retroactive Application of Whitus Could Affect Nearly All Imprisoned Felons in Georgia.

If this Honorable Court should apply the *Whitus* principle retroactively in the instant case where the grand jury is collaterally attacked, it very easily could — and in all probability would — throw wide-open the judicial doors to similar collateral attacks by every convicted felon now incarcerated in the penal system of this State. Such a decision would afford every murderer, rapist, armed robber, safe-cracker and confidence man now serving a sentence under an indictment returned in Georgia prior to January 23, 1967 — the date of the *Whitus* decision — the opportunity to launch a similar collateral attack, with considerable hope of success, upon their respective convictions, regardless of the race of the felons or the nature of their crimes. No special showing

of prejudice to them by the composition of the grand juries which indicted them would be necessary.

This is true because, rightly or wrongly, all Georgia jury lists prior to *Whitus* were required by law to be compiled from the tax books (Ga. Code Ann. 59-106, 107), which in turn were required by another Georgia statute to be segregated by race (Ga. Code Ann. 92-6307). Thus, the primary evil condemned by *Whitus* — the compilation of the jury lists from segregated tax records — would exist in the jury lists of every Judicial Circuit in this State. Then, a mere showing of a disproportionately small number of Negroes — not a total exclusion — on the respective grand juries collaterally attacked, would mean that each and every one of these convicted felons should be granted a new trial. As the Supreme Court of Georgia pointed out in its opinion below, these felons could possibly be set free because of inaccessibility of witnesses and their failing memories and "hordes of such criminals would be turned loose upon society" (223 Ga. 834, 838).

We most respectfully point out that it has never been the policy of this Honorable Court in the past to cause judicial or penal chaos in any single State or any number of States by retroactive application of newly-stated constitutional principles or guidelines. Particularly is this true where the State or States affected have responded promptly and with deference to such decisions of this Court, and acted promptly to correct the situation criticized by this Court. The primary aim of this Court in such constitutional interpretations, when applied to the States through the due process clause of the Fourteenth Amendment, has been to encourage reform of the criticized practices in the several States, and to secure com-

pliance of the States affected with the constitutional guideline laid down by this Court.

(b) Georgia has Proceeded with all Possible Speed to Comply with Whitus.

No State could have moved more swiftly to comply with *Whitus* than has the State of Georgia. On March 30, 1967 — only nine weeks after *Whitus* was announced — the Georgia General Assembly's response to *Whitus* became law. House Bill 307, Ga. Laws 1967, Vol. 1, Pages 251-252, struck the old law relative to the method of compiling jury lists *in its entirety* and provided that "immediately after the passage of this Act and thereafter at least biennially" the jury commissioners shall compile and revise a jury list to be selected from the official voter's list used in the last general election. If this list so compiled is not a fairly representative cross-section of the upright and intelligent voters of the County, the commissioners shall supplement the list by going forth into the county and including citizens of *any significantly identifiable group* in the county *which is not fairly represented on the jury list.* (See Respondent's Appendix III, pp. 47-48, giving the entire text of the new Act.)

Thus Georgia has done all it can to eliminate the "evil" condemned in *Whitus* of selecting jury lists from segregated tax records. Also, contrary to the expressed fears of Petitioner in his Brief that state officials may "engage in an interminable hare-and-hounds contest with this Court" (Brief, p. 21) or that failure of this Court to apply *Whitus* retroactively "might well invite a reliance by Georgia officials on some new method of selection which would, nevertheless, accomplish the unlawful result (of systematic exclusion of Negroes from juries)" (Brief, p. 26), we represent to the Court that the new Act is now

being implemented all over the State of Georgia. Many smaller judicial circuits in primarily rural areas where the population is small have already completed revision of their jury lists from the registered voters lists. This county of Fulton, which embraces nearly all of Atlanta, Georgia and is many times larger than any other Georgia County by population, has virtually completed revision of its jury lists from the registered voters list. Within a month or six weeks Fulton County is expected to have its revision completed and jurors, both grand and petit, will thereafter be drawn from this revised list. No one is attempting to circumvent *Whitus,* to our knowledge.

This result seems to us to be all that this Honorable Court intended to accomplish by its decision in *Whitus* and cases following, except of course to reverse convictions in those specific cases where *timely attack* was made *before trial* upon the composition of *both* grand and petit juries.

We therefore urge this Court to follow the same course it has previously pursued in refusing to give retroactive application to new and somewhat revolutionary (when applied to the States) constitutional concepts in four major cases[2].

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[2]*Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1648, 6 L.Ed. 2d 1081 (search and seizure) held not retroactive in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601; *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106 (impermissible to comment on failure of accused to testify), held not retroactive in *Tehan v. Shott,* 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed. 2d 453; *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (necessity of intelligent waiver of counsel after complete advice as to right to have counsel present during interrogation), held not retroactive in *Johnson v. New Jersey,* 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed. 2d 882; and two cases decided

In two of these cases where this Court declined to give retroactive application to a new constitutional concept, the Court expressed its concern for the potential impact of retroactive application upon the States or areas affected[3].

We therefore will adopt the colorful terms of Petitioner (Brief, p. 25) and respectfully insist that "a mass legalized jailbreak" from the penal system of Georgia could easily result from a retroactive application of *Whitus* in the instant case.

(c) A United States District Court in Georgia has Indicated that Whitus Should not be Applied Retroactively.

In a federal habeas corpus action, *Salisbury v. Grimes, Sheriff*, C.A. No. 11358, Northern District of Georgia, ... F. Supp. ..... (decided January 30, 1968, and not yet reported), the petition alleged disproportionate inclusion of Negroes on the *Grand Jury* of Fulton County which indicted Salisbury for the *armed robbery of a supermarket*. Factually, the case is strikingly similar to the instant one. Salisbury was a *white man* convicted for the third time (his first two convictions were reversed by the Supreme Court of Georgia) who, after his third conviction was affirmed, for the first time attacked the composition of the *grand jury only* by a *collateral* attack in

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together on same day, *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 and *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed. 2d 1178 (right of accused to presence of his lawyer at "lineup"), held not retroactive in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 19 L.Ed. 2d 1199.

[3]This Court observed that retroactive application "would seriously disrupt the application of our criminal laws" in *Johnson v. New Jersey*, supra, Note 2, and "would have a serious impact" upon the area affected, in *Stovall v. Denno*, supra, Note 2.

federal court. Like the instant case, there was no racial issue in *Salisbury*. There were no Negroes on the *Salisbury* grand jury, compared to one Negro on the *Strauss* grand jury. Like Petitioner in this case, Salisbury attacked *only* the grand jury and *not* the petit jury. In *both cases,* the respective indictments were returned *prior* to *Whitus,* and the jury trials were completed *prior* to *Whitus*. United States District Judge Frank A. Hooper (sitting as a Retired Judge – he was formerly Chief Judge of that Court) denied the petition for writ of habeas corpus and remanded Salisbury to the custody of the Sheriff, in a lengthy and scholarly 28 page opinion. While the District Court did not base its denial of the writ on the issue of non-retroactivity of *Whitus,* Judge Hooper did state in part:

> "This petitioner through his counsel relies heavily upon the *Whitus* case and earnestly insists that it was retroactive and that the principles therein decided were binding on the Georgia court at the time that court conducted the third and final trial of Salisbury. If it were necessary to decide whether or not the *Whitus* case was in fact retroactive, this Court *would without hesitation rule that it was not retroactive* in light of several recent decisions by the United States Supreme Court. See *Sylvester Johnson et al vs State of New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882 (June 20, 1966). See also *Victor Linkletter vs Walker,* 381 U.S. 618, 14 L. Ed. 2d. 601 (June 7, 1965) and *Tehan vs Shott,* 382 U.S. 406, 15 L. Ed. 2d 453, decided January 19, 1966". (Emphasis added. Opinion, page 5).

The District Court further found that evidence in the hearing showed there were "7,600 felons in the State Penitentiary of Georgia and a considerable number of them were indicted by grand juries selected in the same

manner as the Salisbury grand jury, but subsequently tried before petit juries selected in a manner above criticism". (Opinion, page 14).

The District Court then denied the petition for writ of habeas corpus as follows:

> "(a) Neither the United States Supreme Court nor the Court of Appeals of the Fifth Judicial Circuit have ruled that *partial* exclusion of Negroes from a grand jury in a State court constitutes sufficient ground for setting aside a conviction in a trial wherein no error appears, *defendant being a white man.*
>
> (b) That a federal court is not justified in setting aside the conviction of a defendant, *a white man,* in a State Court even though discrimination was exercised in the *partial* exclusion of Negroes from the grand jury, *where no prejudice against the petitioner on his trial was shown,* and where three successive trial juries which were legally constituted and selected have returned a verdict of guilty against such defendant." (Opinion, page 21. Emphasis added.)

We add that a Notice of Appeal has been filed by the Petitioner Salisbury in the Fifth Circuit Court of Appeals from the foregoing opinion and order.

While we recognize that the opinion of a single District Court Judge is in no way binding upon this Honorable Court, we do feel that Judge Hooper's reasoning is exactly in point with the issues in this case and should be at least persuasive. The figure of 7,600 potential habeas corpus petitioners now confined in Georgia's penal system is graphically illustrative of the problem Georgia will face if a white man may collaterally attack his conviction under *Whitus* in any sort of case without a showing of actual prejudice.

IV. Application of the Whitus Principle to the Instant Case would be Retroactive Application Despite Petitioner's Claim to the Contrary.

Petitioner argues in Section II of his Brief (pp. 18-22) that the issue of retroactivity has no place in this case since *Whitus* did not change any existing law but was "only a continued application of decades of authority". We disagree. Without attempting an extended analysis of the principal cases he relies upon, we will briefly point out that each such case was decided upon a different basis than *Whitus*. In *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1897), West Virginia law provided that only *white* males who were 21 years old were liable for jury service. This is *total* exclusion of Negroes *by law*. In *Norris v. Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L. Ed. 1074 (1935), undisputed evidence showed that no Negro had ever served on any grand or petit jury within the memory of numerous witnesses, including the clerk of court, court reporter, and other officials of undeniable veracity. Here there was *total* Negro exclusion by *practice of officials*, rather than by law.

In *Avery v. Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L. Ed. 1244 (1953), the names of jurors in the box were segregated by color, with white tickets for white persons and yellow tickets for Negroes. Not a single Negro was included in the list of 60 petit jurors drawn for the trial, though many were available. Further, *no Georgia law authorized* this segregation of prospective jurors in the jury box by different colored slips (see 345 U.S. at 562). Here was *total exclusion not authorized by Georgia law*. This same practice of different colored tickets in the jury box caused the reversal in *Williams v. Georgia*, 349 U.S. 375, 75 S.Ct. 814, 99 L. Ed. 1161 (1955). The *Williams*

case was tried two months before *Avery* was decided by this Court (349 U.S. at 379) which apparently accounts for the failure of Fulton County to have abandoned the white and yellow ticket system in the jury box, not having anticipated the decision in *Avery*. These are the principal cases relied upon by Petitioner.

We earnestly insist that there is nothing in *Strauder, Norris, Avery* and *Williams* which could have put the State of Georgia on notice that State statutes of long standing requiring compilation of jury lists from tax records which were in turn required to be segregated by a widely-separated statute would be stricken down in *Whitus*. *Whitus* is different from these four prior cases in that these other cases involved total exclusion of *Negroes*, either by law or by *ultre vires* acts of State officials, whereas *Whitus* was decided on the basis that the system afforded an *opportunity for discrimination* which this Court could not say was not resorted to by the jury commissioners. If this Court had held in *Avery* and *Williams* that compilation of jury lists from segregated tax records was discriminatory, then application of *Whitus* to this case *would not* be retroactive. However, this Court said nothing about this method of selection in *Avery* and *Williams*, although citing those statutes requiring such a mode of selection. Therefore, we feel it is quite clear that any application of *Whitus* to the instant case, which was tried three months prior to the decision in *Whitus*, would constitute retroactive application. And we again urge this Court *not* to resort to retroactive application.

V. The Evidence does not Show any Wilful Discrimination against Negroes in the Compiling of the Jury Lists.

While we do not think there is any real issue in this case as to whether the evidence makes out a *prima facie* case of discrimination under *Whitus*, in view of the limited holding of the Supreme Court of Georgia which did not reach the constitutional issue, Petitioner throughout his brief assumes and constantly reiterates that this is a worse case of discrimination than *Whitus*. In so doing, he is placing his own interpretation upon the testimony of the commissioners and drawing his own conclusions therefrom. We will not burden this Brief, which is already overlong, by dissecting the testimony of each commissioner and drawing our opposite conclusion from it. However, we refer this Court to the carefully-considered opinion and order of Chief Judge Ralph Pharr before whom the *habeas corpus* hearing was held (R. 28-36). He found, among other facts, that the Jury Commissioners did not discriminate against any race; that the only use of the colored tax returns was by one jury commissioner who used it for the purpose of *putting Negroes on the* jury list (see testimony of Commissioner Shukraft, a self-styled "intellectual liberal", at T 27-28); and that there were large numbers of Negroes' names on both grand and petit jury lists. Ample support for these findings can be found in the record.

We also call attention to the judicial notice which Chief Judge Pharr took of the fact that in 1964 – the year of the Strauss indictment – there were many Negroes whose names were in both jury boxes; these names were printed in black on white slips of paper and it was impossible for a Judge to know whether any name drawn was that of a white or colored person.

In one final word in passing, we point out that Petitioner chose in his table on Page 15 of his Brief compar-

ing respective figures and percentages in *Whitus, Jones,* and the instant case to show 14.99% of the Fulton County taxpayers as Negroes, and 2.7% as Negro Jurors in this case, instead of showing that there was one Negro on the 23 member Grand Juror which indicted Petitioner, or a percentage of 4.3% Negro representation on the actual grand jury which returned the indictment. (T. 57).

We therefore do not at all concede that the evidence in the hearing brings this case under *Whitus.* In our view, this resolution of this factual issue is not essential for determination either way because of the limited extent of the ruling of the Supreme Court of Georgia in declining to give retroactive application to *Whitus.*

VI. Petitioner Cannot Complain of Alleged Discrimination Against Negroes on the Grand Jury Which Indicted Him, Because He is a White Man and is Not a Member of the Class Allegedly Discriminated Against, in the Absence of a Showing of Special Prejudice To Him.

Petitioner has cited several cases in support of his position that he can complain of "systematic exclusion" (there is no evidence of "exclusion" in this case) of a class from juries without being a member of the class excluded. However, we earnestly insist that each case is distinguishable from the instant one. He relies chiefly on *Ballard v. United States,* 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181; *Allen v. State,* 110 Ga. App. 56, 137 S.E. 2d 711 (1954); *Rabinowitz v. United States,* 366 F.2d 37 (CA 5, 1966); and *Thiel v. Southern Pacific Company,* 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181. (Petitioner's Brief, pp. 16, 17). Each is clearly distinguishable.

Both *Ballard* and *Thiel* were cases in *federal district courts.* In *Ballard,* a mail fraud prosecution, this Court reversed the conviction because women had been "intentionally and systematically excluded" from the federal jury panel although the local state law (California) made women eligible for jury duty. In so doing, this Court stated in part ". . . as in the *Thiel* case, we should *exercise our power of supervision over the administration of justice* in the *federal courts*". (329 U.S. at 193 Emphasis added).

In the *Thiel* case, a tort action removed from State to the federal district court, the petitioner moved to strike the entire *federal* jury panel on the grounds that daily wage earners were excluded and that the federal panel was comprised of mostly business executives. Again this Court reversed on the same ground as in *Ballard,* i.e., "in the exercise of our power of supervision over the administration of justice in the federal courts". (328 U.S. at 225).

However, this Court then made it quite clear in a subsequent decision, *Fay v. New York,* 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043, that *Ballard* and *Thiel* were not controlling in a *State Court case* where a defendant objects to exclusions from the jury where he is not a member of the excluded class. This Court stated in part:

> "This Court, however, has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class. Rawlins v. Georgia, 201 U.S. 638, 640, 50 L.Ed. 899, 900, 26 S.Ct. 560, 5 Ann. Cas. 783. Cf. Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664. Relief has been held unavailable to a negro who objected that all white persons were purposely ex-

cluded from the grand jury that indicted him. Haraway v. State, 203 Ark. 912, 159 S.W. 2d 733.

Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well-established case under the Amendment. These defendants rely heavily on arguments drawn from our decisions in Glasser v. United States, 315 U.S. 60, 86 L. Ed. 680, 62 S.Ct. 457; Thiel v. Southern P. Co. 328 U.S. 217, 90 L. Ed. 1181, 66 S.Ct. 984, 166 ALR 1412, and Ballard v. United States, 329 U.S. 187, ante, 1181, 67 S.Ct. 261. The facts in the present case are distinguishable in vital and obvious particulars from those in any of these cases. But those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice. *They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and* these expressions of policy *are not necessarily embodied in the concept of due process."* (Italics supplied)

It should be noted that the case above cited referred to certain cases also cited by the Georgia Court of Appeals in the case of *Allen v. State,* supra, to-wit, *Glasser v. United States,* 315 U.S. 60; *Ballard v. United States,* 329 U.S. 187 and *Thiel v. Southern Pacific Company,* supra.

Decisions therefore by the United States Supreme Court based upon the duty of federal courts to supervise the selection of juries in the federal courts are not controlling upon irregularities in the selection of a grand jury in a State court where such irregularity does not violate due process to which the accused is entitled under the Fourteenth Amendment, *nor does it in any*

manner prejudice the accused on the trial of the case. It has been pointed out that there is a *material difference where irregularity is charged in connection with the establishment of the grand jury on the one hand,* or the trial jury on the other. In the case of *Charles v. Maxwell, Warden,* 348 F. 2d 890 (6 Cir.) there was a claim that the grand jury which indicted petitioner was not legally constituted. The court said in part:

> "There are no allegations in the petition that the persons selected by the judge were not qualified to sit on a grand jury, no claim that the appellant did not have a fair trial before the petit jury and no claim that the crime for which he was indicted was not an offense under the laws of Ohio. Neither is it alleged that the appellant was prejudiced in any way by the method of selecting the grand jury."

The court ruled:

> "We agree that the decision in this case may not be used by one accused or already convicted for the purpose of invalidating any indictment returned by a grand jury heretofore selected by a judge in the manner employed by the respondent."

The court added:

> "We find no violation of any constitutional right of the appellant."

In the *Allen* case, supra, the defendant was a white man. However, he was engaged in voter registration activities among Negroes when he assaulted an officer. He moved to quash the indictment and challenged the array of traverse jurors *before trial.* The Court of Appeals of Georgia reversed his conviction. No Negro *had ever been* called for jury service in the County. The Georgia Court of Appeals observed, however, "we can-

not say as a matter of law that this defendant, who was active in voter registration among Negroes, was not a member of a group systematically excluded in selecting grand and traverse jurors" (110 Ga. App. at 62). Thus, the identification of the defendant with Negroes obviously played a part in the *Allen* decision.

Rabinowitz, supra, involved a prosecution of a white girl convicted of perjury in the United States District Court for the Middle District of Georgia. She was a field worker for SNCC, a primarily Negro, civil rights group, and her alleged perjury grew out of her testimony before a federal grand jury concerning the organization's demonstrations and picketing of a store owned by a member of a federal petit jury which had returned a verdict against a Negro. After challenges before trial to the grand and petit juries, an *en banc* decision of the Fifth Circuit reversed, with two judges partially dissenting. However, in this appeal *no issue was raised* as to the appellant's standing to raise the question of jury composition (366 F.2d 37) and the majority opinion merely cited the *Ballard* case in a footnote.

Ballard also involved a *federal* jury and does not support Petitioner Strauss' position. The *Fay* decision, supra, of this Court expressly distinguishes between the power of this Court to regulate inferior federal courts through its supervisory power as to the composition of its jury panels where the appellant is not a member of the class excluded, and the reluctance of this Court to do so when the composition of a State court jury is challenged by a person not a member of the class excluded or discriminated against. We have been unable through exhaustive research to find any case in this Honorable Court which overrules the *Fay* case, supra, and insist that it still is

the law of the land with respect to the inability of a defendant to attack the exclusion from a jury of a class to which he does not belong, in a State Court proceeding.

Therefore, we respectfully insist that Petitioner, as a white man indicted in a non-racial case, with no showing of special prejudice against him, and no significant identification with Negro civil rights movements or demonstrations, completely lacks legal standing to challenge an alleged discrimination against Negroes on the State Court grand jury which indicted him.

SUMMARY OF ARGUMENT

We apologize for the unusual length of this Brief opposing a writ of certiorari, which are usually much shorter. However, because in two recent decisions of this Honorable Court in cases following the *Whitus* principle, i.e. *Anderson* and *Sullivan,* supra, this Court has granted certiorari and reversed decisions of the Supreme Court of Georgia *summarily and without a plenary hearing,* we wish to make our position completely clear on all issues in this extremely important case. We wish to accentuate the potential chaos that retroactive application of *Whitus* to collateral attack can bring to the judicial and penal system of this State.

In summary, we feel that this Court should decline to apply *Whitus* retroactively to a collateral attack by a white man in a non-racial case complaining of alleged disproportionate inclusion of Negroes on the grand jury which indicted him. Particularly is this so where no evidence was offered of any such discrimination against Negroes on the petit jury which convicted him. Petitioner has no standing to make such an attack in the cir-

cumstances of this case, where he has shown no special prejudice to him by the composition of said grand jury.

Further, we respectfully point out that retroactive application of *Whitus* in the instant case could have a disasterous effect upon the administration of criminal justice in Georgia. Thousands of convicted felons similarly situated as Petitioner could collaterally attack their indictments by Georgia grand juries, even where they were not prejudiced in the slightest by a disproportionately small number of Negroes on the respective grand juries which indicted them. Retrials after grants of new trials would be impossible in many instances, due to loss or other disposition of physical evidence, death or removal from the State of vital witnesses, lapse of memory of witnesses, and all the other disabilities usually suffered by prosecuting authorities caused by the lapse of time between commission of the crime and a retrial.

Finally, Georgia has repealed the law respecting the compilation of jury lists from segregated tax records, criticized in *Whitus,* and enacted a new law which eliminates any possibility of discrimination against Negroes serving on Georgia juries in the future. The new law is being rapidly implemented all over Georgia, and the evil criticized in *Whitus* can never occur again.

CONCLUSION

Petitioner Strauss richly deserved the fifteen year sentence imposed on him by the traverse jury, and we earnestly maintain that none of his constitutional rights were violated by the composition of this grand jury which he finally got around to attacking only after his direct appeal was dismissed.

Therefore, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

PAUL GINSBERG
Assistant Solicitor General
Atlanta Judicial Circuit

J. WALTER LECRAW
Assistant Solicitor General
Atlanta Judicial Circuit

Fulton County
Courthouse
Atlanta, Georgia 30303

J. ROBERT SPARKS
Assistant Solicitor General
Atlanta Judicial Circuit

LEWIS R. SLATON
Solicitor General
Atlanta Judicial Circuit

Counsel for Respondent

CERTIFICATE OF SERVICE

IT IS HEREBY certified that three true and correct copies of the within and foregoing Respondent's Brief Opposing Petition for Writ of Certiorari, and Appendices which follow have been mailed by prepaid airmail to the law firm of Arthur B. Cunningham and Philip T. Weinstein, 812 Ainsley Building, Miami, Florida 33132, and three additional copies have been mailed to Attorney Harold Karp, 1317 William Oliver Building, Atlanta, Georgia 30303, counsel for Petitioner.

This.....day of April, 1968.

Of Counsel for Respondent

APPENDIX I

41677. STRAUSS et al. v. THE STATE.

DEEN, Judge. Strauss and others were charged in a five-count indictment with violations of the Georgia Securities Act (Ga. L. 1957, p. 134 et seq.) by defrauding various named persons through the sale of bogus money orders, particularly by a violation of *Code Ann.* § 97-112 (b) which makes it unlawful in security transactions "to employ any device, scheme, or artifice to defraud or to engage in any act, practice, transaction, or course of business which operates or would operate as a fraud or deceit upon the purchaser or seller." Briefly, each count sets out a money order purchased by a named person from one of three corporations controlled by the defendants which money order was paid for by the purchaser, and payment of which was refused. Beginning on September 3, 1963, the defendants conspired to defraud such purchasers and the general public by offering for sale "purportedly genuine and negotiable money orders, which in truth and fact were worthless, for a valuable consideration; by diverting and misapplying money derived from the sale of said securities to the general public to uses beneficial to said accused other than the ultimate payment of said money orders; by operating a check kiting scheme between bank accounts in said Crown Savings Bank and in other banking and financial institutions." The transactions are set out in detail. The conspirators allegedly falsely represented to merchants that they had posted the $100,000 bond required by the State of Georgia. The money orders were drawn on Crown Savings Bank and the defendant Jackson falsified the records of said bank, overstating both the con-

trol account and the various accounts of the three corporations. Merchants, acting as innocent agents, were induced by stated false representations to sell the bogus money orders to the public, they receiving a commission for this service. Receipts were ostensibly deposited in a named list of banks, but the accused "continually and on a daily basis transferred large credits between said accounts and banks by checks and debit memoranda to cover up and conceal large overdrafts in the over-all accounts of said three companies, thereby operating a 'check-kite' in that the gross face value of all money orders sold which were still outstanding and in the process of being presented to said Crown Savings Bank for payment far exceeded the total funds and credits of said money order companies in all of aforesaid accounts, as accused well knew. Said 'check-kite' was operated by said accused to enable money orders drawn upon said Crown Savings Bank to be paid upon presentation to that bank, and thus enable said accused to continue to sell money orders in great volume through its innocent agents aforesaid, and to collect the money derived from such sales, even though there was never enough money or credits in any and all accounts of said money order companies with which to pay the total amount of money orders sold, outstanding and as yet unpresented for payment, as accused well knew." Details of the check transactions and dates follow, which show a continuous overdraft of over $100,000 in the First National Bank, Columbus, between July 2 and July 20, 1964; a like overdraft of over $30,000 in the Liberty National Bank & Trust Co. of Savannah between July 6 and July 22, and false credits posted in Crown Savings Bank in the "Citizens Bank, Stockbridge, Georgia"

control account of the three companies in excess of $205,000. Details of fraudulent transfers of funds from the control account to accounts of other corporations owned by the defendant, for the purpose of misapplying and diverting funds and credits on August 14, 1964, are detailed. Between September 4 and September 9 the defendants collected $118,750.31 from agents selling the money orders with knowledge that Crown Savings Bank was refusing payment on all such orders "as having been drawn against uncollected funds" knowing the bank had been closed by order of the Virginia Commissioners of Banking, and "wilfully and unlawfully failed and refused to refund said money to the persons who had paid same as the purchase price of money orders . . . whereby the purchasers were defrauded and suffered pecuniary losses." General and special demurrers to the indictment were overruled and the defendants appealed. *Held:*

1. *Code Ann.* § 97-102 (i) defines a security as "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of indebtedness, investment certificate, certificate of interest or participation, certificate of interest in oil, gas or other mineral rights, collateral trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate or beneficial interest in title to property, profits or earnings, or any other instrument commonly known as a security." Negotiable instruments, while they are securities, are exempt from the provisions of the Act. *Code Ann.* § 97-106. An ordinary contract for personal services is not a security. *Dame v. Lee,* 180 Ga. 315 (178 SE 752). However, a guaranty contract is an "evidence of indebtedness"

which is by definition a security. *Goldstein v. Ipswich Hosiery Co.*, 104 Ga. App. 500 (16) (122 SE2d 339). In *Littlefield & Bro. v. Clary*, 66 Ga. 322, a mortgage was held to be a security for debt rather than a mere evidence of indebtedness because it was a lien binding particular property. The same distinction obtains in *McIntire v. Garmany*, 8 Ga. App. 802 (3) (70 SE 198). The money orders in question here are not negotiable instruments under *Code* § 109A-3—104 because, while they meet the other requirements of the section, they are not, as required by subsection (1) (d) payable to order or bearer as money orders usually are. On the other hand, they have prominently inscribed the words "Know Your Endorser" which, together with the general form of the instrument suggest to the purchaser that they are negotiable in the same manner as a check. Although not a negotiable instrument, each of the instruments is certainly an evidence of indebtedness as above defined, and those demurrers attacking the various counts of the indictment on the ground that the paper involved was not a security within the meaning of the Act are not well taken.

2. There are no crimes in Georgia except those made so by statute. There is no such crime as *conspiracy per se*, but the crime is the act prohibited by statute, and, if it results from a corrupt agreement, each co-conspirator is liable for the acts of all. *Kilpatrick v. State*, 72 Ga. App. 669 (34 SE2d 719). The third ground of special demurrer which charges that the indictment is duplicitous because it "charges the same offense by attempting to allege each separate money order as an individual count" is defective for the rea-

son that duplicity means, not alleging the same transaction in varying ways by means of separate counts, but in alleging more than one theory or version of the transaction in a single count. *Orr v. Cooledge,* 117 Ga. 195 (3) (43 SE 527). A conspiracy to defraud may result in a number of people suffering loss, and each loss is a separate crime for which punishment may be exacted. In *Curtis v. State,* 102 Ga. App. 790 (118 SE2d 264) 36 separate violations of the same Security Act were charged and the court held that the sentences on conviction might be imposed cumulatively. In *Mitchell v. State,* 89 Ga. App. 80 (78 SE2d 563), two defendants were charged in 47 counts of automobile theft, all pursuant to the same plan or scheme. See also *Bulfin v. State,* 38 Ga. App. 358 (144 SE 15); *York v. State,* 42 Ga. App. 453 (156 SE 733). Even if the indictment did charge the same offense in separate counts, the remedy would not be by demurrer for duplicity but by a motion to elect on the part of the State on which count it wished to rely for conviction. *Lascelles v. State,* 90 Ga. 347 (4) (16 SE 945); *Pippin v. State,* 205 Ga. 316 (5) (53 SE2d 482). The separate counts of this indictment appear to charge separate offenses, each of them the defrauding of a named person in a given amount through the victim's purchase of a bogus money order, which is a proper method of pleading.

3. It is further contended that the various counts of the petition do not negative the possibility that there were sufficient funds in the Crown Savings Bank to the credit of the money order company involved in each of the sales. Each count of the indictment alleges that the purchaser involved therein was actually defrauded

and did suffer a pecuniary loss; that the payee did not receive payment of money in any amount and the defendants did not refund the money to the purchaser but retained it for their own use. And, as to funds in the control account in the bank, it is alleged that the bank was, at a slightly later time, refusing payment on all such orders as having been drawn against uncollected funds; the methods of operation by conversion of funds collected, large overdrafts covered by kited checks and concealment through falsification of accounts adequately establishes as against demurrer that while some money orders may have been properly cashed, others, including the ones involved here, were unpaid due to the fraud of the defendants.

4. The remaining special demurrers, not being argued, are treated as abandoned.

The indictment was not defective for any reason assigned.

Judgment affirmed. Nichols, P. J., and Hall, J., concur.

ARGUED JANUARY 5, 1966—DECIDED JANUARY 18, 1966—

REHEARING DENIED FEBRUARY 4, 1966—
CERT. APPLIED FOR.

Securities Act violations. Fulton Superior Court. Before Judge Boykin, Emeritus.

Wesley R. Asinof, Charles R. Smith, Robert Carpenter, for appellants.

Lewis R. Slaton, Solicitor General, J. Robert Sparks, J. Walter LeCraw, for appellee.

APPENDIX II

42802. STRAUSS v. THE STATE.

JOSLIN, Judge. The notice of appeal in this case was filed in the office of the Clerk of the Superior Court of Fulton County on November 8, 1966. The transcript of the record was not filed in the office of the clerk of the superior court until March 23, 1967. No order extending the time for the filing of the transcript appears of record, nor does it appear that any application for such an order was made before the expiration of 30 days from the date the notice of appeal was filed. Under the applicable provisions of the 1965 Appellate Practice Act and under the rulings of the Supreme Court in *Davis v. Davis,* 222 Ga. 579 (151 SE2d 123), and *Joiner v. State,* 223 Ga. 367 (155 SE2d 8), the appeal in this case must be

Dismissed. Bell, P. J., and Pannell, J., concur.

ARGUED MAY 1, 1967—DECIDED JUNE 23, 1967—

REHEARING DENIED JULY 11, 1967—CERT. APPLIED FOR.

Appellate procedure. Fulton Superior Court. Before Judge Lilly from Southern Circuit.

Walter M. Henritze, Jr., William V. Hall, Sr., Arthur B. Cunningham, for appellant.

Lewis R. Slaton, Solicitor General, J. Walter LeCraw, J. Robert Sparks, for appellee.

APPENDIX III

SELECTION OF GRAND AND TRAVERSE JURORS.

Code § 59-106 Amended.

No. 122 (House Bill No. 307).

An Act to amend section 59-106 of the Code of Georgia of 1933, as amended, relating to the revision of jury lists and the method whereby jury commissioners choose grand and traverse jurors, so as to change the method of choosing grand and traverse jurors; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. Section 59-106 of the Code of Georgia of 1933, relating to the revision of jury lists and the method whereby jury commissioners choose grand and traverse jurors, is hereby amended by striking same in its entirety and inserting in lieu thereof a new section 59-106 to read as follows:

"59-106. Immediately upon the passage of this Act and thereafter at least biennially, or, if the judge of the superior court shall direct, at least annually, on the first Monday in August, or within sixty (60) days thereafter, the board of jury commissioners shall compile and maintain and revise a jury list of upright and intelligent citizens of the county to serve as jurors. In composing such list they shall select a fairly representative cross-section of the upright and intelligent citizens of the county from the official registered voters' list which was used in the last preceding general election. If at any time it appears to the jury commissioners that the jury list, so composed, is not a fairly representative cross-section of the upright

and intelligent citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including upright and intelligent citizens of any significantly identifiable group in the county which may not be fairly represented thereon.

After selecting the citizens to serve as jurors, the jury commissioners shall select from the jury list a sufficient number, not exceeding two-fifths of the whole number, to serve as grand jurors. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except when a name which has already been drawn for the same term as a grand juror shall also be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 30, 1967.

APPENDIX IV

EXCERPTS FROM THE PROCEEDINGS IMMEDIATELY FOLLOWING THE OPENING STATEMENT BY THE ASSISTANT SOLICITOR GENERAL AT THE ORIGINAL TRIAL OF THIS CASE, INITIALLY WITH THE JURY EXCUSED FROM THE COURTROOM.

MR. ASINOF: If Your Honor please, I am going to move for a mistrial on the grounds that the Solicitor General in his opening address to the jury made one statement referring to the Crown Savings Bank, Newport News, Virginia, as being an all Negro bank and then made another statement in the same opening address referring to the Citizens Trust Company in Atlanta, Georgia, as being quote also an all Negro bank, end of quotes. We move for a mistrial on the ground that the racial issue as to whether or not these banks were Negro or White has no place in the trial of this case, that it prejudices the defendant who is a Caucasian from having a fair trial in that it injects the racial issue into the case.

(T-5)

MR. SPARKS: If it please the Court, I had absolutely no intention of being prejudicial or injecting any racial issue into the case. I was simply identifying the banks because numerous persons from both banks will testify, and they will all be Negro citizens. I assure the Court that I did not intend to, I was simply identifying the bank because we are going to have the president, we are going to have employees, tellers, Frank Dallas Jackson. We are going to have Negro employees from the Citizens

(T-8)

Trust Company appear as witnesses for the State. It will appear in the testimony that they are all Negro banks, as the jurors will see as the witnesses take the stand. However, I have no objection to the Court's admonishing the jury not to consider that remark, and also the Court may rebuke me, if the Court so desires, in the presence of the jury. That would certainly cure the error because in this case no corrective action was taken by the Court. I will be glad to state to the jury that I did not intend any racial connotation, and I will apologize to the jury.

(At the Court's direction, the jury returned into the courtroom.)

THE COURT: Lady and gentlemen of the jury, the Solicitor General, Mr. Sparks, the Assistant Solicitor General, in his opening statement referred to two banks as being all Negro banks. Do not let that statement of the Solicitor General prejudice your mind one way or another against the defendant on trial in this case. I shall hear from you, Mr. Sparks.

MR. SPARKS: Your Honor, I meant no racial prejudice at all in making that statement. I was simply attempting to identify the banks, one being an Atlanta bank and one being a Virginia bank. A number of witnesses will appear from each of the banks, and they will all be persons of the Negro race, and I was simply attempting to identify the banks. I did not mean any racial connotation. I did not intend to install any racial prejudice or inject any racial prejudice into the case. And if I did, I apologize to the jury, and I apologize to

the Court. And I ask the jury not to consider that remark and to forgive me for having made it. And I state again that I did not intend any racial prejudice in the case because witnesses, both Negro and white, will appear for the State equally.

THE COURT: As I have previously stated, lady and gentlemen, do not let that statement with reference to the banks being owned by Negroes influence your minds one way or the other. We are trying this case upon the evidence and the evidence alone. I shall overrule your motion. You may call your first witness.

EVIDENCE FOR THE STATE:

JOHN H. SMITH

---

after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. SPARKS:

Q What is your name, please?

A John H. Smith.

Q What is your occupation, Mr. Smith?

A I am presently employed as steward and stockkeeper and handle the daily supplies and so forth and records and so forth for

Office-Supreme Court, U.S.
FILED
MAY 3 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

N° 1227

ROBERT L. STRAUSS,

Petitioner

vs.

T. RALPH GRIMES, Sheriff of Fulton County, Georgia,

Respondent.

PETITIONER'S REPLY BRIEF

ARTHUR B. CUNNINGHAM
PHILIP T. WEINSTEIN
812 Ainsley Building
Miami, Florida 33132

HAROLD KARP
1317 William Oliver Bldg.
Atlanta, Georgia 30303

Attorneys for Petitioner

CUNNINGHAM & WEINSTEIN
MIAMI, FLORIDA

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

N° _____

ROBERT L. STRAUSS,

Petitioner,

vs.

T. RALPH GRIMES, Sheriff of Fulton County, Georgia,

Respondent.

PETITIONER'S REPLY BRIEF

In accordance with the authority contained in Rule 24-4 of the Rules of this Court, the Petitioner respectfully presents this reply brief to one certain argument made by the Respondent in his brief in opposition.

Respondent in his brief (pp. 4, 5) has taken issue with the Petitioner's assertion that his habeas corpus attack was directed to both the Grand Jury and the Petit Jury. Respondent states that

> "the case deals solely with Grand Jurors," (p.5).

While we consider that the matter has been covered in the petition, caution requires us further to answer this contention.

CUNNINGHAM & WEINSTEIN
MIAMI, FLORIDA

It will be recalled that the selection methods testified to by Petitioner's witnesses, related to the method of selection of the "Revised Jury List". (R. 139-140, Petitioner's Exhibit 4). There was no question whatever that this List formed the source of both, the Grand and Petit ("Traverse") Jurors. The only distinction was that up to two-fifths (2/5) of that List were selected as Grand Jurors (Georgia Code §59-106, Appendix 5 to original petition; Petition pp. 4-5; Whitus v. Georgia, 385 U.S. 545, 548).

It is true that Petitioner's statistical evidence related to Grand Jurors. This was only to point out an illegal part of an illegal whole. In Whitus v. Georgia, supra, this Court observed that the showing of actual mathematical disparity between Negroes in the Tax Digest and Negroes on the venires, where significant, were sufficient to make out the prima facie showing of unconstitutional discrimination.

Therefore, while we do not consider it necessary to the Court's disposition of this cause, but in a desire to inform the Court, we attach hereto as an Appendix, a further affidavit of witness Hobbs, who originally testified in this cause (R. 104, et seq.).

This affidavit shows that the percentage of Negroes on the Petit Jury panels, from which the trial jury in this case was drawn, was 5.1% and that no Negroes served on the actual jury.

Respectfully submitted,

ARTHUR B. CUNNINGHAM
PHILIP T. WEINSTEIN
812 Ainsley Building
Miami, Florida 33132

HAROLD KARP
1317 William Oliver Bldg.
Atlanta, Georgia 30303

Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

ROBERT L. STRAUSS, Petitioner V. T. RALPH GRIMES, Sheriff of Fulton County, Georgia, Respondent	)	NO. 1227

AFFIDAVIT OF LeROY C. HOBBS

IN PERSON, before me, the undersigned Notary Public, duly authorized to administer oaths, appeared LeROY C. HOBBS, who, upon being first duly sworn, deposes and says:

That is is a practicing attorney in the City of Atlanta, Georgia, with offices at 1317 William-Oliver Building. That he testified as a witness in the Habeas Corpus proceeding brought by one ROBERT L. STRAUSS in the Superior Court of Fulton County, Georgia, under the style of Robert L. Strauss, Petitioner -v.- T. Ralph Grimes, Sheriff, Respondent, being Case No. 1300, in which the manner of composition of the Grand Jury which indicted petitioner was raised by said petitioner.

That in his testimony, deponent gave statistical evidence of the percentage of Negroes appearing in the 1962-1963 Jury List prepared by the County Commissioners of said County, as they related to the Grand Jury which indicted the petitioner, ROBERT L. STRAUSS.

That said statistical information and percentages formed the basis from which the Statistical Table was prepared which said table appears on pages 5 and 6 of the Petition for a Writ of Certiorari to the Supreme Court of Georgia, above styled.

That on May 1, 1968, deponent obtained from the Clerk's Office, Fulton Superior Court, Criminal Division, the original list comprising 16 panels of petit jurors furnished to the Trial Court in which the said ROBERT L. STRAUSS was tried on September 12, 1966 and from which the Petit Jury trying said defendant was selected, showing, among other things, the names of the jurors, those jurors which were excused for cause, those jurors stricken by counsel for the State and those jurors stricken by counsel for the defendant, a copy of which list is attached hereto and made a part hereof by reference.

That from said list attached hereto and identified hereby, deponent took all 184 names of the prospective jurors and examined the 1962, 1963 and 1964 Tax Digests, for the purpose of determining how many of said jurors were white and how many were Negro. (The Tax Digests for said three years all indicating in a separate column the race of all taxpayers named therein).

That as a result of deponent's examination, aforesaid, deponent determined that 160 of said named jurors were of the white race, 11 were Negro and 13 were not identifiable from the Tax Digests at that point in deponent's examination.

Deponent avers that he made an examination of the Telephone Directory, Street Directory and other records available to him for the purpose of determining, if possible, the number of Negroes and whites numbered in the 13 unidentified names. Deponent avers that the result of these efforts indicated that of the 13 unidentified jurors named, 11 were white and 2 remained unidentified as to race.

That based upon 182 identified jurors as to race, and based upon 11 of that number being Negroes, the percentage of Negroes on the proposed jury panels hereinbefore referred to amounts to 5.1%.

That according to said exhibit no negroes served

on the jury of twelve regular and two alternate jurors, which tried defendant Strauss.

LeRoy C. Hobbs

LeRoy C. Hobbs

Sworn to and subscribed before
me this the 1st day of May, 1968

/s/ ALICE S. BROWN

Notary Public, Georgia State at Large
Commission Expires July 9, 1968

Judge Tilley. Friday Morning

PANEL NO. 1

1 EDGAR L RICE C 30
2 S E COURT.
3 H H CHARLES
4 ~~MRS. VIRGINIA THOMPSON~~
5 ~~JEANETT C BROWN~~
6 HUCH W REEVES C 28
7 GEORGE C JONES
8 JOSEPH P GALLAGHER
9 CHARLES G RAY
10 ~~MARCUS V WHITLOCK~~
11 ~~W H ALLEN JR.~~
12 NOLAN P SANCHEZ

PANEL NO. 2

13 CARL E HILBERT JR.
14 MRS. VELTA COUCH
15 HENRY JOS. DUFFY
16 TANZIE H ADAMS
17 C E GAMMAGE JR.
18 ~~PAUL V SEYDEL~~
19 B E PRICE
20 FRANCES V BAZZEL
21 ~~JESSE W LUKE~~
22 ~~CHAS. W DANFORTH~~
23 AUBREY H WOOD
24 JOE S CHANEY C 31

PANEL NO 3

25 GLEN W KIRKLAND SR. C 2
26 ROBERT A BRACE (1)
27 J Q OGLE D 1
28 MABLE DINSDALE D 2-3
29 MARION T NUNN S 1
30 E H HEATH (2)
31 MARY W CULLISON S 2
32 KATHLEEN GARNER D 3
33 WM. E FORESTER (3)
34 SAM W TURNER D 4
35 WOODROW R SHEPHERD D 5
36 J E HOOD C 3

PANEL NO. 4

37 ALEX W BRADLEY JR. (4)
38 JAMES ALLEN JOHNSON C 4
39 CHARLES R OGLETREE D 6
40 GENE H CATES (5)
41 J W CLAYTON ~~(6)~~ C 60 9-16-66
42 CHAS. A MOON S 3
43 BRUCE E ROSS D 7
44 SEABORN K JORDAN D 8
45 ALBERT L CALLAHAN C 5
46 OSWALD L MC ELROY D 9
47 WM. C BRITT C 6
48 MRS. INEZ H TUCKER C 7

PANEL NO. 5

49 MILFORD R TOWNER C 32
50 ~~H M WILLIAMS~~
51 ~~WM. L RAMSEY~~
52 ~~FRANK TAYLOR~~ C 33
53 WM. KELLY
54 ~~ROY A RICHARDS~~
55 WM. G REEVES JR. S 5
56 MRS. ~~V J LISENBY~~
57 JIMMY L HODGES JR. C 34
58 ~~RAYMOND COLLETT~~
59 ~~MRS. EMMETT STEELE~~ SR.
60 JAMES M HOLLIDAY

PANEL NO. 6

61 HULAN WEBB
62 M M BOYLE
63 JOHN B DUNCAN
64 ETHYL CARLTON
65 WADE KING SIMS
66 R L DURDEN
67 B A GUYTON JR
68 JAMES L MORRIS D 13
69 GEORGE H CONKLIN
70 MAURICE M BRANNON
71 JOSEPH C ROBERTSON
72 THOMAS L PINKERTON JR

PANEL NO. 7

73 WILLIAM W MILAM C8
74 LOUISE T HUNTER C9
75 JOHN R CRUMBLEY JR 54
76 MARTIN A OWENS D 10
77 ANNETTE L DOBBIE C 10
78 RAYMOND O GILL C 11
79 R H WILSON 3R C 1
(7) 80 L T DOYAL (7)
81 GEORGE L COWART C 12
(8) 82 JOHN T LITTLE (8)
83 H NORRIS PYE C 13
84 LEON C PARKER C 14

PANEL NO. 8

85 JAMES O (Otis E.) BURDETTE JR (Sr) C 35
(86) CHARLES W BOROUGHS C 63
(87) MAYNARD H SPIVEY C 64
88 W L CLARK JR C 36
(12) (89) HEBERT H BRUCE (12)
(90) R ALLEN REEVES C 65

(10) 91 GEORGE B COBB D 21
92 MICHAEL MORPHY (10)
(93) R O MORRIS C 61
(94) JOSEPH E WALL C 62
(95) FAY T BROWN S8
(96) COLEY TRIPP D 22

PANEL NO. 9

97 WINFIELD E SIMS D 14
98 EMORY T MONTGOMERY JR C 27
99 D C WEIGLE C 37
100 E F MC CLELLAN D 15
101 J W WELCH C 38
102 C E SCRAGGS C 39
103 C R WALKER C 40
104 ~~MRS LOUIS TAFFEL~~
105 LUCILLE L CRAWFORD C 41
106 HENRIETTA F BLACKISTONE D 16
107 GEO T JOHNSON C 42
108 ROSA MAE REEVES 56

PANEL NO. 10

109 ~~ROY W DAVIS~~
110 ~~ALBERT G HENLEY~~ JR
111 ~~J P HOLLAND~~
112 ~~R GAYLE DEAN~~
113 ~~JOE F WRIGHT~~
114 ~~L W SHIPPEY~~
115 ~~LEONARD L LOWE~~
116 ~~ALTON S CHANGE~~
117 ~~WALTER D BLACKSTOCK~~
118 ~~MRS CLAUDIA H WOODALL~~
119 ~~ROGERS M WARE~~
120 ~~W L SILCOX~~

PANEL NO. 11

121 ROBERT E BADDERS C 15

122 FRANK B WILSON

123 JOEL C MAY (9)

124 SANFORD E DAVIS C 43

125 RAYMOND F WILSON D 11

126 HELEN BUETELL C 16

127 O MORGAN HALL C 17

128 GARNETT J ENGLAND C 18

129 ROY M HONEA C 19

130 R A CRIDER C 20

131 HARVEY G BOOTH D 12

132 CARL L CLARK (11)

PANEL NO. 12

133 ~~CLARENCE D CHADWICK~~

134 ~~CLARENCE P CHRISTOPHER~~

135 ~~JAMES H WHITE~~

136 ~~JOSEPHINE S LE GRAW~~

137 ~~EDDIE LOMAX JR.~~

138 WESLEY C DUSENBERG C 24

139 ~~JOHN OTWELL~~

140 HAINES HARGRETT C 25

141 ~~JAMES EDGAR KERLIN~~

142 ~~EDWARD H CAMPBELL~~

143 ARTHUR KLOPSTOCK

144 ~~JOHN MARTIN RUFF JR.~~

PANEL NO. 13

145 E N SUMRALL C 44

146 RAY A HOWARD D 17

147 NOBLE R ROWE

148 IVEY L WOMACK C 45

149 WOODROW COX

150 JAMES BROWN

151 ASA M BARBER D 23

152 RICHARD L HOTALING C 66

153 LEONARD M WYLIE (13) 10-EX-J-66

154 CLAIRE B REED C 46

155 WM. S YOUNG (14)

156 PLEDGER W TRIBBLE JR. C 47

PANEL NO. 14

157 ROBERT L LEWIS C 29

158 HUBERT Y WILLIS JR C 48

159 R R WALLACE D 18

160 ~~ROBERT R BELLAMY~~

161 D F DE LONG C 49

162 BOBBY B DUKE C 50

163 R M BEARDEN C 51

164 JAMES A BEAVERS C 52

165 JOS. HENRY HALLMAN JR. C 53

166 R D ADAMS C 54

167 CHAS. W CLINE C 55

168 ROBERT R CHASTAIN D 19

PANEL NO. 15

169 OTIS A SMITH S 7

170 ~~JOHN C MC KENZIE~~

171 MRS. ALBERT L ~~STAND~~ STRAND (6)

172 WILBER E. CARSON C 26

173 J T MUNDY C 56

174 MERRELL BROWN D 20

175 JESSE W. ELLIOTT C 57

176 LOCKE M BARKSDALE

177 LEILA J JOHNSON

178 D S. CARTER

179 THOMAS L ELDER JR. C 58

180 CLIFFORD B FAIR C 59

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that two true and correct copies of the within and foregoing Petitioner's Reply Brief and Appendix, have been mailed by prepaid airmail to the HON. LEWIS R. SLATON, Solicitor General, Fulton Judicial Circuit, Fulton County Courthouse, Atlanta, Georgia, and two additional copies have been mailed by prepaid airmail to the HON. ARTHUR K. BOLTON, Attorney General of the State of Georgia, 132 Judicial Building, Atlanta, Georgia, this 2nd day of May, 1968.